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In The

Supreme Court of the United States

October Term, 1981

Ziad Abu Eain,

Petitioner,

v.

Peter Wilkes, United States Marshall for the Northern District of Illinois,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether there is sufficient evidence to justify committal to trial under the laws of the United States when in an extradition hearing the evidence presented is (a) the confession of an alleged accomplice, Jamal Yasin, written in a language he cannot speak or read, which he twice recanted insofar as it implicated the petitioner, Ziad Abu Eain, and which is not corroborated by any evidence linking Ziad to any element of the offense, but only by (b) the earlier confession of another person, Mufida Jaber, also in a language she cannot speak or read, which she recanted insofar as it referred to Ziad, that did not refer to the offense charged, but stated that Jamal sent Ziad two notes days after the alleged offense which she delivered, the first saying several persons were arrested, to be careful and Ziad told her he was going to America and (c) evasive conduct by Ziad at the time of his arrest plus his knowledge that Israel, not Jordan, was seeking him.

2. Whether the bombing of persons in a public place by a member of an organization which is committed to the destruction of the government and is frequently committing similar acts against it is an offense of a political character under treaties excepting such offenses from extradition.

3. Whether the accused was denied the hearing required by Title 18, United States Code, Section 3184 because the Magistrate (a) refused to consider recantations of confessions one of which was the only evidence linking accused to criminal acts, (b) refused to grant letters rogatory and requests to take depositions to determine the conditions under which the confessions were taken, whether rights essential to acceptance of the confessions at a preliminary hearing under United States law were denied and details of the recantations, (c) refused to consider affidavits and other documents offered to show the accused was

in a distant city on the day of the offense to test the reliability of confessions implicating accused and obliterate their probability, (d) refused to consider testimony and documents describing the nature of the participants in political violence between the State of Israel and Palestinian Arabs.

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6 Whiteman, Digest of International Law, 732, 853 (1968). 17

Opinions Below

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 641 F.2d 504 (1981) and is in the Appendix at page 1A . The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois is in the Appendix at page 35A. The Memorandum of the United States Magistrate is in the Appendix at page 39A.

Jurisdiction

The judgment of the Court of Appeals for the Seventh Circuit was entered on February 20, 1981. A timely petition for rehearing in banc was denied on April 13, 1981. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

Treaty Provisions and Statute Involved

A. Treaty Provisions

Name of Treaty - Convention of Extradition Between The Government of the United States of America and The Government of the State of Israel, Entered into force December 5, 1963.

The Government of the United States of America and the Government of the State of Israel, desiring to make more effective the cooperation of the two countries in the repression of crime, agree as follows:

Article 2

Persons shall be delivered up according to the provisions of the present Convention for prosecution when they have been charged with, or to undergo sentence when they have been convicted of, any of the following offenses:

1. Murder.
2. Manslaughter.
3. Malicious wounding: inflicting grievous bodily harm.

Article V

Extradition shall be granted only if the evidence be found sufficient, according to the laws of the place where the person sought shall be found, either to justify his committal for trial if the offense of which he is accused had been committed in that place or to prove that he is the identical person convicted by the courts of the requesting Party.

Article VI

Extradition shall not be granted in any of the following circumstances:

4. When the offense is regarded by the requested Party as one of a political character or if the person sought proves that the request for his extradition has, in fact, been made with a view to trying or punishing him for an offense of a politcal character.

B. Statute

Title 18 United States Code, Section 3184: Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any magistrate authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign

government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made.

June 25, 1948, c. 645, 62 Stat. 822; Oct. 17, 1968, PublL. 90-578, Title III, §301(a)(3) 82 Stat. 1115.

STATEMENT OF THE CASE

Extradition proceedings were commenced by the United States against petitioner at the request of the State of Israel under Title 18 of the United States Code, §3184 and Article X of the Treaty between the United States and Israel. Petitioner was arrested in Chicago, Illinois on August 21, 1979 and remains in custody there. He is charged with murder and causing bodily harm with aggravating intent committed by placing an explosive device in a trash bin on a public street by a market square in Tiberias, Israel on May 14, 1979, the eve of the birth date of the State of Israel. The explosion killed two and injured thirty-six persons.

A Magistrate took evidence over a period of seven days. On December 18, 1979, she found probable cause existed to believe petitioner committed the charged offenses and that the circumstances of their commission are not within the exception contained in Article VI section 4 of the Treaty prohibiting extradition for offenses of a political character. On December 28, 1979, petitioner filed a petition for a writ of habeas corpus in the District Court. The petition was denied by the District Court, which adopted the Magistrate's Memorandum, on March 28, 1980 without a hearing.

Evidence on which the Magistrate based her findings follows:

1) Israel forwarded a statement attributed to Jamal Yasin, an alleged accomplice, described by the Magistrate as the principal document implicating the accused. It is the only direct evidence against petitioner. It is in Hebrew, a language Jamal neither speaks, understands, reads or writes. It was signed in Arabic on July 23, 1979, probably weeks after Jamal's arrest during which period he had no known access to counsel,

family, or friend. His treatment during confinement is unknown. A magistrate in Jerusalem conversed with Jamal in Arabic and found that he understood the contents of his statement. The U. S. Magistrate denied Ziad's request to take the deposition of Jamal in Israel to determine details of two recantations he made of his statement, when he was arrested, how long he was held before his confession, how he was treated during this period, what rights he was apprised of and whether he was offered or had access to counsel, family or friends.

The statement alleges Jamal and Ziad traveled from Ramallah in the Occupied West Bank of Jordan to Tiberias in Israel, a drive of several hours, on May 11, 1979 and reconnoitered in Tiberias for three hours. He enlisted Ziad that day in El Fatah, a crime under the laws of Israel. Jamal explained to Ziad he wanted to carry out an attack on Tiberias on May 14.

The statement further alleges Jamal prepared a bomb on May 14 and instructed Ziad how to set the wires and timing device. Ziad asked Jamal to permit him to go alone to Tiberias because Jamal would be suspected. Jamal instructed petitioner not to go near an Army vehicle so he or the car might not be suspected and to place the bomb in a refuse bin in Tiberias; it did not matter what refuse bin. He gave Ziad his car and money to use en route. Ziad left for Tiberias at 9 a.m. and returned at 4:30 p.m. informing Jamal that he had placed the bomb in a refuse bin in the center of town. The next day, May 15, Jamal met Ziad and told him of news reports he had heard and said the operation had succeeded. He gave Ziad a code name after a comrade killed in action and gave the attack on Tiberias a name. Jamal sent Ziad a letter on May 17 which his cousin Mufida Jaber delivered to him asking Ziad to go to Syria to an

Abu Ziyad's office, report what had happened and deliver a letter. Mufida informed Jamal that Ziad had gone to America via Amman. (Jamal's statement is at Appendix 68).

2) Petitioner offered two statements under oath and subject to perjury by Jamal dated September 26 and October 2, 1979. They were witnessed by two attorneys representing him. He alleged his statement given to the authorities implicating Ziad in an illegal organization and participating in and executing a military operation were not true. Jamal said he implicated Ziad because he was sure Ziad was out of the country and it was impossible to arrest him. The Magistrate refused to admit them in evidence. (Jamal's recantation of September 26 is at Appendix 82).

3) Israel forwarded a statement attributed to Mufida Jaber written in Hebrew which she cannot read or write and signed in Arabic on July 4, 1979. It says she wished to tell several things she had not told in an earlier statement of June 7, 1979. She then alleged that four days after Jamal became wanted, a lad she did not know gave her a note and asked her to give it to Ziad Tarifi. The note said "To Ziad, Talila, Jan and Umum Ammar have been caught. Be careful." Ziad asked where Jamal was. Mufida replied she did not know. Ziad then said he wished to go to America. About four days later she received another letter from the same lad and delivered it to Ziad. She did not know its contents. She mentioned three earlier trips she made to Syria to meet a person named Abu Ziyad who gave her money for Jamal and with whom she discussed a cache of explosives. (Mufida's statement is at Appendix 76).

4) Petitioner offered a statement by Mufida dated October 2, 1979 in which she said her state-

ments to the police dated June 7 and July 4, 1979 were written in Hebrew and she cannot read Hebrew. She alleged the statements were untrue when they said she was a member of El Fatah, had knowledge of explosives, had received a note from Jamal which she delivered to Ziad and that Ziad said he was going to America. This statement was witnessed by her lawyer. The Magistrate refused to admit it in evidence. (Mufida's recantation is at Appendix 84).

5) Captain Pakad Zion Peretz gave a statement on August 13, 1979 in which he said he headed a special team to investigate the bombing in Tiberias on May 14, 1979. He said an explosive charge went off at about 2:00 on that day in a refuse bin on an iron post on Hagalil Street. Two boys were killed and 36 people were injured and taken to hospitals. (Government Exhibit 1.)

6) Ziad's oldest sister, living in Chicago, wired her family in May asking a member of the family to come to Chicago to help care for her children because she was ill. On May 20, 1979 Ziad obtained a visa to the United States. On June 5 he entered Jordan with an Israeli transit permit granted May 31. He arrived in Chicago on June 14, 1979 where he stayed with his sister and brother-in-law. On August 17, FBI agents went to the residence of Ziad's sister with an arrest warrant which they stated was on the request of Jordan. Ziad, who was there, gave a false name. He was taken to the FBI office, photographed, fingerprinted and then released. The FBI subsequently received fingerprints from Israel which matched those they had taken from Ziad. When they returned to Ziad's sister's residence on August 21, 1979, Ziad was not there. After they explained the consequences of harboring a fugitive, Ziad's brother-in-law made two phone calls, one in Arabic, one in English. During the second

call he was heard to say he wanted Ziad to come to his sister's to talk with an attorney. Shortly thereafter Ziad arrived and was arrested. His brother-in-law testified Ziad returned voluntarily. On the way to the FBI office Ziad told the FBI agents the request for his arrest was from Israel not Jordan.

7) In July 1979, Ziad learned that his father and older brother had been arrested in Ramallah and held without charge for twenty-four days while they were questioned about his whereabouts. (The Magistrate refused to permit testimony to establish this. T1104).

8) Ziad, a 19 year old Palestinian Arab, lived in Ramallah in the Occupied West Bank of Jordan with his family at the time of the bombing in Tiberias. He claimed to be in Ramallah all day on May 14, 1979. He offered in evidence the birth certificate of a child born to his sister-in-law in the General Hospital at Ramallah that day together with statements under oath and subject to perjury of eleven people, including his sister-in-law, two doctors, his father and brother, that he was in Ramallah at the hospital all that day. The Magistrate refused to admit them in evidence. (Defense Exhibits 25, 26, 28-37).

9) The bulk of the testimony and documentary evidence before the Magistrate was presented on the issue of the offense of a "political character" exception in the treaty. This evidence described the history of struggle in the region for land, independence and sovereignity before and after the creation of the State of Israel in 1948. The nature of political violence by Palestinian Arabs

including acts of war, military operations, frequent bombings in public places and hit and run guerilla activities in Israel were detailed. Military and police tactics by Israel were proffered. The claim of the Palestinian Liberation Organization to be the sole, legitimate representative of the Palestinian people and its purpose to create a secular, democratic, unitary state in the area comprised of Moslems, Christians and Jews was introduced. El Fatah was described as the largest and most influential component of the PLO. The Court of Appeals summarized the "PLO seeks the destruction of the Israeli political structure...and...directs its destructive efforts at a defined civilian populace." (Appendix 26A). Fahd Qawasmeh, Mayor of Hebron, and others, testified that a state of war exists between Israel and the PLO supported by some Arab states. Professor T. M. Mallison testified to "insurrection," "uprising" and "political conflict." Rabbi Elmer Berger and Mayor Qawasmeh testified that bombings carried out in connection with the political conflict were "most typical and common" (T. 499), "very frequent" (T. 666), and "organized and systematic." (T. 428-9) Alexandra Johnson, a former U. S. Vice Consul in Jerusalem testified that one of her duties had been to monitor and report acts of political resistance in Israel and the occupied territories including certain types of violence, the most typical and common of which was placing an explosive charge in a public place where Israeli Jews congregate. The incidents of explosive charges detonating in public places were very frequent and more frequent in Israel than in Occupied Territory. Israel's response was invariably mass arrests.

10) A great deal of testimony and documentation offered in evidence directed at the nature of the political conflict between Israel and Palestinian Arabs, the methods of violence employed, and the treatment of prisoners by Israel was rejected by the Magistrate. Among the rejected evidence was testimony of torture and forced confessions (T. 119, 137, 401, 403), identification of the organizations involved in armed resistance (T. 428, 429, 735, 780, 806, 1022, 1100), the political character of the Tiberias bombing (T. 824), the political involvement of petitioner (Defense Exhibit 3), and extensive reports on political conflict in the area (e.g. Defense Exhibit 16, Anglo-American Committee of Inquiry: Defense Exhibit 17, Peel Commission).

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided three important questions of federal law which have not been settled by this Court. Each question vitally affects fundamental human rights of individuals in the United States whom foreign governments seek to extradite for alleged crimes. In an epoch of great international tension, widespread violence and easy mobility, the United States should have a clear, firm, rational and even-handed body of law governing extradition to assure individual rights and minimize international friction.

1. There was not sufficient evidence to justify committal for trial under the laws of the United States.

The privilege of the Writ of Habeas Corpus has little value in the drastic field of international extradition if the evidence below is sufficient. There must be "competent legal evidence" supporting the finding that there was reasonable ground to believe the accused guilty. Ornelas v. Ruiz, 161 U.S. 502, 509 (1896); Fernandez v. Phillips, 268 U.S. 311 (1925).

Ziad has never questioned the fact that a bomb exploded in Tiberias on May 14, 1979 killing two people and injuring thirty-six. He has consistently denied that he placed the bomb or had any knowledge of who did. He has consistently stated his opposition to violence.

The only direct evidence linking Ziad to the bombing in Tiberias is the confession of the alleged accomplice Jamal. The confession of an accomplice "...is not regarded with favor, is discredited by the law, should be weighed with care, is subject to grave suspicion, should be viewed with caution...where it appears that the witness has hopes of reward from the prosecution then his testimony should not be accepted unless it carries with it absolute conviction of its truth." People v. Hermans, 5 I11 277 (1955) See Holmgren v. U.S. 217 U.S. 519, 524 (1910).

The confession was written in Hebrew, a language the confessor does not understand, speak, read or write and signed by him in Arabic.

The Court of Appeals found "no merit" in the suggestion that this alone made the confession inherently suspect. The comment will encourage use of confessions in languages unknown to the confessor at a time when widespread use of confessions in nations violating human rights is well known.

A written confession should be in a language the confessor speaks wherever possible. The original confession can only be made in such a language. The person taking the confession must understand that language and can therefore write it in the confessor's language. Translation before writing a confession exposes it to risks of interpolation, suggestion, error and falsehood. The person confessing cannot review it without translation.

The acceptance of confessions for political crimes is dangerous. An Amnesty International document of June, 1979 which the Magistrate refused to consider estimated that 95% of all convictions for membership in illegal organizations in Israel and the Occupied Territories were based on the confession of the accused.

This confession was taken under inherently coercive circumstances, apparently without a prior opportunity to consult counsel, family or friend and after an unknown but likely period of weeks of detention. The confession is vague, illogical, internally inconsistent, self-contradictory and near incredible. After decades of armed struggle and terrorist violence, the known high level of public and police alertness, the widespread police use of administrative detention, the accepted

practice of holding people for months without access to counsel, how probable is it that all on one day a member of El Fatah, Jamal, would recruit a new member, Ziad, drive with him for hours to Tiberias in his own car, reconnoiter the streets for three hours and state his purpose to set off a bomb there three days later? Would he then, three days later, make a bomb, show Ziad how to set the timer, agree that Ziad should take it by himself and tell him where to place it? If he did not go because he would be suspected, why would he have risked a three hour reconnaisance three days earlier? Why would he give his car to Ziad, member of a well-to-do family with cars of its own? Had he no concern that Ziad might be caught or later confess? With mass arrests sure to follow a successful effort would he risk identification?

The record shows that Jamal was sought by the police almost immediately after the bombing at least two weeks before Ziad was granted a permit by Israeli police to enter Jordan. But the Magistrate denied Ziad letters rogatory and the chance to take depositions in Israel from which he might establish that Jamal was held incommunicado for weeks before he confessed, denied a lawyer, and perhaps tortured.

On September 26 and October 2, 1979, Jamal recanted his statement insofar as it involved Ziad and said he implicated him only because he thought Ziad was safely beyond the jurisdiction of Israel. The Magistrate would not accept the retractions to test the reliability of his confession or permit discovery of the details of the recantation. See Application of D'Amico, 185 F.Supp 925 (S.D.N.Y. 1960).

There was no corroboration of any material fact or act which is an element of the offense. See People v. Looney, 324 Ill. 375 (1927). The extradition rests on Jamal's confession alone.

Mufida's confession made on July 4, 1979, nearly three weeks before Jamal's, was the earliest mention of Ziad in the record. Her original confession of June 9 did not mention Ziad. The confession is written in Hebrew, a language Mufida does not speak or read. It states she made three trips to Syria for Jamal, her cousin. She refers to a note delivered to Ziad stating some people have been arrested, to be careful. The contents of the note Mufida describes are different than the description in Jamal's confession. Jamal stated that in the note he asked Ziad to go to Syria, report what happened and deliver a letter there. The note Mufida describes implies a number of people were involved in the bombing while Jamal's confession involves only Ziad and himself. Her confession does not mention any element of a criminal act or event of May 14.

Like Jamal, Mufida recanted the part of her confession involving Ziad when contacted by her counsel on October 2, 1979. She denied receiving a note written by Jamal from an unknown person, denied delivering a note to Ziad and denied saying Ziad was going to America. She also denied personal membership in El Fatah and knowledge of explosives.

Ziad's conduct in Chicago when he was sought by the FBI does not imply guilt. He knew the authorities in Israel were looking for him. His father and older brother were arrested and held for twenty-four days in

July for questioning about Ziad's whereabouts. His family had called from Ramallah to tell him this. He denied his identity to the FBI because he did not want to be arrested. He corrected the FBI, stating it was Israel, not Jordan, that wanted him because he had been told Israeli police were looking for him by his family. While the record is ambiguous and the Magistrate made no finding on the issue, Ziad insists and his brother-in-law testified that he turned himself in to the FBI on August 21, 1979.

Eleven affidavits were offered in evidence which placed Ziad in Ramallah all day on May 14, 1979. A birth certificate was offered in evidence to show Ziad's sister-in-law gave birth to a child at the General Hospital in Ramallah that day. Among the affiants were S. Musleh, Ziad's sister-in-law, Dr. Ateh Mahmoud Manna who delivered Ziad's nephew that day, Dr. S. Al-Jada, Ziad's father and his brother, the new father. The affidavits could be the basis for perjury prosecutions. The purpose of the affidavits was not to present a defense or alibi to the charge, but establish the improbability of the recanted confession of an accomplice. The force of these affidavits should obliterate the reliability of the evidence offered to show probable cause. See Shapiro v. Ferrantino, 355 F.Supp. 563, 572 (S.D.N.Y. 1973) modified 478 F.2d 874 (CA2 1973).

A magistrate cannot and should not try the issue of guilt or innocence in an extradition proceeding. But extradition involves an extreme deprivation of liberty. Care must be taken that there be some evidence establishing probable cause to believe the crime al-

leged was committed by the accused before he is transported involuntarily half way around the world for trial, often to an emotional environment under a government that may not provide due process of law.

2. Extradition is prohibited by Article VI, paragraph 4 of the Treaty because the offense is regarded as one of a political character under the laws of the United States.

This Court has not addressed the question of whether violent acts directed against people in public places by members of organizations seeking to overthrow a government come within the political acts exception contained in U.S. extradition treaties. It is a question of profound importance to individual freedom, political self-determination and international peace. The existence of organizations using violence against the public to overthrow governments in many nations, friendly and unfriendly, and the ease of travel by persons committing such acts requires a clear, firm and even-handed rule of law.

The question involves the Supreme Law of the land. The Magistrate and Courts below did not address the real issue. The Court of Appeals wrote "The Magistrate held that simply noting membership in the PLO, but not tying the membership to the specific act alleged was insufficient to satisfy the burden petitioner must shoulder in order to invoke the political offense exception...Because the bombing was not shown to be incidental to the conflict in Israel, the magistrate held that it was therefore not an act covered within the political offense exception. We agree with her conclusion." (Appendix p. 27.)

The Court of Appeals totally failed to reconcile its own earlier deacription of Jamal Yasin's statement "Yasin and petitioner traveled to Tiberias for reconnaissance purposes in connection with their membership in PLO. The two men were scouting for a location in which to place a bomb. On May 14, the celebration of Israels Independence, Yasin prepared an explosive charge which he gave to petitioner with an explanation as to its operation." (Appendix p. 5).

The Courts conclusion defies everything in the record and common experience. The confession of Jamal contains the only evidence linking Ziad to the events of May 14. Jamal stated he and Ziad talked politics enroute and he recruited Ziad into El Fatah the day they reconnoitered in Tiberias. Jamal told Ziad after he enlisted him into El Fatah he would train and teach him to carry out attacks. He gave him his car and money, the bomb and instructions on how and where to set it. He considered the attack a military operation. He chose the eve of Israels birth date. He gave Ziad a code name after a comrade who had been killed in an earlier skirmish and gave a name to the attack on Tiberias. He asked Ziad to report what had happened to an office in Syria.

However criminal, horrible, tragic, misdirected, even self-defeating the bombing, it was certainly part of a campaign against the State of Israel. The State of Israel emphatically proclaimed it so. How strange that our courts alone deny it. What other rational explanation could there be? To permit these findings of fact contrary to all the evidence and to all experience to stand is a great disservice to law.

The explanation for the holdings below is a natural abhorrence of terrorism, our great compassion for the Jewish people and popular support for the State of Israel by our government and the American people.

The law of the United States, however, is otherwise. Our courts have construed offenses of a political character under extradition treaties to include acts committed in the course of and incidental to a violent political disturbance such as a war, revolution or rebellion. Ornelas v. Ruiz, 161 U.S. 502 (1896); Karadzole v. Artukovic, 247 F.2d 198 (CA 9 1957); vacated and remanded 355 U.S. 393 (1958) (murder of "17,600 unidentified children" among 200,000 by Yugoslavian Minister of the Interior during Nazi occupation "were offenses of a political character".); Escobedo v. United States, 623 F.2d 1098 (CA 5 1980); In re Ezeta, 62 F 972 (N.D. Cal. 1894); Ramos v. Diaz, 159 F. Supp. 454 (S.D. Fla. 1959); In re McMullen, Magistrate's Opinions No. 3-78-1099, M.G. May 11, 1979 (N.D. Cal.)(Alleged member of Provisional Irish Republican Army charged with bombing Claro Barracks, a British Army Installation. Extradition denied under treaty prohibiting extradition for acts of a political character).

Karadzole v. Artukovic, supra, shows the importance of the Courts settling this question. The Ninth Circuit opinion is in direct conflict with the Seventh Circuit in this case. After the judgment of the Ninth Circuit was vacated, the Magistrate on remand adopted the opinion of the Court of Appeals and held the offenses, the alleged slaughter of hundreds of thousands of

civilians were offenses of a political character and denied extradition. United States v. Artukovic, 170 F.Supp. 383 (S.D. Cal. 1959).

The practice of refusing to extradite persons accused of political offenses existed from the beginning of our government. Thomas Jefferson, as our first Secretary of State, proclaimed the practice which has been followed by his successors. See 6 Whiteman, supra at 732; 2 Hyde, supra at 1020; E. Clarke, A Treatise Upon the Law of Extradition 47-49 (1974); I. Moore J B A Treatise on Extradition and Interstate Rendition 304-6, 314-15 (1891). Though early extradition treaties did not contain political acts exceptions, the practice was clear:

> "Neither the extradition clause in the treaty of 1794 nor in that of 1842 contains any reference to immunity for politcal offenses, or to the protection of asylum for politcal or religious refugees. The public sentiment of both countries made it unnecessary. Between the United States and Great Britain, it was not supposed, on either side, that guarantees were required of each other against a thing inherently impossible..." (Letter of Secretary of State Fish to Mr. Hoffman, May 22, 1876; quoted in 2 Hyde, International Law 1020 n.)

It is natural, therefore, that our courts followed the British test set forth in In Re Castioni, 1 QB 149 (1891): "Whether the man was acting as one of a number of persons engaged in acts of violence of a political character with a political objective, and as part of a political movement and rising in which he was taking part."

The general acceptance of the rule is attested in Lauterpacht, The Law of Nations and the Punishment of War Crimes, XXI Brit. Yb Int'l (1944) 55, 88; cited in 6 Whiteman, Digest of International Law 853 (1968):

"We are confronted with the impressive fact that in the legislation of modern states there are few principles so universally adopted as that of non-extradition of political offenders."

Recent international practice confirms the principle. In 1976 Dr. Andrew J. Pierre wrote "...of the more than 150 Palestinian terrorists who have been arrested in Western Europe in the past five years, all but nine...have been quietly released with or without trial." Quoted in Weston, Falk & D'Amato, International Law and World Order at p. 490 (1980).

The rule followed in the United States, often called the "incidence test", has been criticized for protecting persons who commit common violent crime in a time of political upheaval. See Garcia-Mora, The Nature of Political Offenses: A Knotty Porblem of Extradition Law, 48 Virginia L. Rev. 1226 at 1244

(1962); I.A. Shearer, Extradition in International Law 181 (1971); Lubet & Czackes, The Role of the American Judiciary in the Extradition of Political Terrorists, 71 J. Crim. L. & Criminology 193 (1980).

The Court of Appeals concluded "that existing law is sufficiently flexible to avoid such abuses." (Appendix 24). It proceeded to rule contrary to obvious truth and the record that the acts were not incidental to the political disturbances common within Israel because it did not want to face the fact that bombings in public places which kill people are commonplace in political struggles in many countries. Like other organizations opposing existing governments, the PLO views the act of bombings in public places as a "political and military necessity." Statement of Zehdi Terzi, Permanent Observer of the PLO at the United Nations, reported in The Guardian, p. 16, October 31, 1979.

There are important policy reasons supporting the historic United States practice and rule of law prohibiting extradition of political offenders. They should be affirmatively stated by this court.

International extradition plays an important role in the control of ordinary crime. It provides an essential international cooperation in the apprehension of indidivuals who have committed acts all nations agree are crimes.

When the acts are political in character, directed against a state and seeking its overthrow, different considerations

arise. The historic roots of U.S. refusals to extradite under these circumstances are found in a desire to protect revolutionaries often seeking to overthrow tyranny. As has been noted when considering extradition of political offenders, our government was born in revolution. The policy sought to advance self determination of peoples and avoid taking sides against persons seeking to overthrow a dictatorial government. It was aware, too, that such governments often denied basic rights of fair trial and inflicted cruel and unusual punishments. It was sensitive to the emotion generated by a revolutionary atmosphere.

The sound foundation for the principle is not a sentimental attachment to revolution, or a belief that all governments are repressive. Today we see friendly and unfriendly governments, democratic and authoritarian, alike besieged by political turmoil, revolution and terrorist acts. The question is what principle is most supportive of individual freedom, self determination and peace.

When persons are extradited for political acts, the nation returning them takes sides in an internal political struggle. Only the state can seek extradition. Its colonels may commit atrocities with impunity against the people and the very people who resist may be turned over to the colonels at their request if found in another nation.

If politcal offenders are turned over to a friendly nation like Israel, by what rationale do we decline to return political offenders to unfriendly governments with whom we have comparable treaties? Are treaties, part of the Supreme law of the land, to be construed in a consistent manner without regard to the nation involved? If executive discretion is the only protection, what happens to the rights of the individual involved in the struggle?

Nations which extradite persons accused of political offenses against a foreign government, on a selective basis, become by that act an enemy of those struggling against the foreign government. Nations which refuse to extradite such persons on a selective basis become by that act an enemy of that foreign government. Both enlarge the area of potential conflict and risk international war. A nation which dares to live by principle, that is by law, will refuse to extradite a person wanted for political acts against a foreign government, whether friend or foe.

Simultaneously such a nation should work for international laws and forums to deal with terrorist acts, human rights violations by governments and war crimes in neutral and balanced proceedings. They alone can protect human rights by offering genuine neutrality, permit self determination by not returning persons to governments they seek to overthrow, yet apply international standards of criminal conduct to both sides.

International law can offer peace by avoiding the alignment of nations in internal struggles of other peoples while enforcing international rules protecting universal human rights.

Until such rules can be forged and courts created, the United States should stand on its historic practice and legal principle prohibiting extradition of political offenders in the interest of individual freedom, self determination of nations and world peace.

3. The Magistrate's rejection of evidence offered and denial of letters rogatory and authorization for depositions amounted to a denial of the hearing required by Title 18, United States Code, §3184.

Petitioner believes there was not sufficient evidence to justify his commital for trial and the existing record clearly establishes that the offense charged is one of a political character. The case can and should be finally determined on the present record.

If this court disagrees with both of these positions, then the case should be remanded for a hearing. The Magistrate has in effect denied petitioner any meaningful opportunity to challenge the probability, reliability and competency, to explain or clarify or to obliterate by overwhelming evidence, the vague, inconsistent, contradictory, suspect and inadequate documentary evidence submitted by Israel. See Fernandez v. Phillips,

268 U.S. 311 (1925); Shapiro v. Ferrandina, 478 F.2d 894 (1973).

The confession of the alleged accomplice, unclear and improbable in its own terms and uncorrobated was twice recanted. The Magistrate refused to permit inquiry into the conditions under which the confession was taken. How long was Jamal held? Under what conditions? Was he tortured? Were rights essential to acceptance of the confession in a preliminary hearing under United States law denied?

Ordinarily alibi evidence should not be admitted in a probable cause hearing. But where the state's evidence is inadequate, or so weak as to raise serious question of its adequacy, affidavits by eleven people with supporting documents establishing without doubt, unless false, that the accused was in another city at the time of the crime should end the inquiry. It simply obliterates the state's inadequate showing.

The Magistrate refused to consider a great deal of testimony and documentary evidence on the state of war between Israel and the PLO, the purposes and acts of the PLO, the people involved in armed resistance, the types of violence experienced, the nature and frequency of bombings in Israel, the uses of torture and denials of fair trials. This is evidence that would have provided a fuller and clearer picture of the political character of the offenses charges and the adequacy of the evidence submitted.

The Magistrate's rulings "...amounted to a denial of the hearing prescribed by law." Collins v. Loisel, 259 U.S. 309, 317 (1922).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal.

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In the

United States Court of Appeals

For the Seventh Circuit

No. 80-1487

ZIYAD ABU EAIN,

Petitioner-Appellant,

v.

PETER WILKES, United States Marshal for the Northern District of Illinois,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79-C-5477—Frank J. McGarr, *Judge.*

ARGUED SEPTEMBER 26, 1980—DECIDED FEBRUARY 20, 1981

Before PELL, *Circuit Judge,* SKELTON, *Senior Judge,** and WOOD, *Circuit Judge.*

WOOD, *Circuit Judge.* Petitioner Abu Eain is accused by the State of Israel of setting a bomb on May 14, 1979, that exploded during the afternoon in the teeming market area of the Israeli city of Tiberias,[1] killing two young boys[2] and maiming or otherwise injuring more than thirty other peo-

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* Senior Judge Byron G. Skelton of the United States Court of Claims is sitting by designation.

[1] Tiberias is a popular resort town on the west coast of the Sea of Galilee.

[2] At the time Tiberias was unusually crowded with young people gathering for a youth rally.

ple. Israel seeks the extradition of petitioner from the United States. Petitioner, a resident of the West Bank area of the Jordan River, traveled to Chicago, Illinois via Jordan shortly after the Tiberias bombing incident. Pursuant to an extradition treaty between the United States and Israel, and in accordance with the federal statute governing American extradition procedure, 18 U.S.C. § 3184, a magistrate in the Northern District of Illinois after a hearing determined that defendant should be extradited to Israel to stand trial for murder, attempted murder and causing bodily harm with aggravating intent. Petitioner then sought a writ of habeas corpus from the district court (there being no provision for direct appeal) to prevent the Secretary of State from extraditing him in accordance with the magistrate's determination. The district court denied the writ. We affirm.

Petitioner contends that the evidence fails to establish probable cause to believe that he committed the crimes charged.[3] Alternatively, petitioner argues that if the evidence is sufficient to show probable cause, then the crimes of which he is accused do not fall within the terms of the treaty providing for extradition. Petitioner claims that it is apparent that the bombing was politically motivated and that political offenses of that kind are excepted from the extradition treaty. Petitioner further contends that if the bombing was not within the political offense exception, then Israel's "indictment" of him for the alleged crimes amounts only to a subterfuge in order to have him returned for trial, not for the alleged offenses, but instead for the political offense of membership in the Al Fatah branch of the Palestine Liberation Organization (PLO).[4]

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[3] Originally petitioner contended that he was not the person charged in Israel. The government presented fingerprint and photographic evidence identifying petitioner as being the person both charged and sought to be extradited. The identity issue has not been raised on appeal by petitioner.

[4] For purposes of this opinion, we will refer to both the Palestine Liberation Organization and Al Fatah by the initials "PLO."

I. The Process of Extradition

The Extradition Treaty between the United States and Israel became effective in 1963. 14 U.S.T. 1707. Article II of that Treaty provides, *inter alia*, for extradition of persons accused of murder and infliction of grievous bodily harm, as well as attempts to commit those crimes. Article V of the Treaty provides that a person may be extradited only if the evidence is "found sufficient, according to the laws of the place where the person sought shall be found . . . to justify his committal for trial if the offense of which he is accused had been committed in that place. . . ." This form of treaty provision has been held to require a finding of probable cause under federal law. *Shapiro v. Ferrandina*, 478 F.2d 894 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973).

As an exception to the foregoing Treaty provisions, Article VI, paragraph 4 of the Treaty states that extradition shall not be granted "[w]hen the offense is regarded by the requested Party as one of a political character or if the person sought proves that the request for his extradition has, in fact, been made with a view to trying or punishing him for an offense of a political character."

Since the technical aspects of extradition procedure are not explicitly stated in the Treaty, this country's laws guide the manner in which a decision is made whether or not an individual may be extradited from this country to Israel. We briefly discuss the provisions of the laws of the United States concerning extradition since the arguments of both petitioner and the government on the facts of this case and their contentions on what the law requires can best be understood in the context of overall extradition procedure which varies from the common interstate process.

The procedure in the United States for extradition is governed by 18 U.S.C. §§ 3181-3195. In brief, the statutes require that a country seeking extradition of an individual submit to our government through proper diplomatic channels a request for extradition. That request must in general be supported by sufficient evidence to show that the individual is the person sought for the crimes charged, that the crimes are among those listed as extraditable

offenses in the Treaty and that there is sufficient justification for the individual's arrest had the charged crime been committed in the United States. After evaluation and approval by the Department of State, the necessary papers may be forwarded to the United States Attorney in the district where the person sought to be extradited may be found. The United States Attorney may then file a complaint and seek an arrest warrant from a magistrate. If a warrant issues the magistrate then conducts a hearing under 18 U.S.C. § 3184 to determine "[i]f, on such hearing, [the magistrate] deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention. . . ." The Federal Rules of Evidence and Criminal Procedure do not apply in such a hearing. Fed. R. Evid. 1101(d)(3); Fed. R. Crim. Proc. 54(b)(5). It is fundamental that the person whose extradition is sought is not entitled to a full trial at the magistrate's probable cause hearing. The person charged is not to be tried in this country for crimes he is alleged to have committed in the requesting country. That is the task of the civil courts of the other country.

Under § 3184, should the magistrate either determine that the offense charged is not within a treaty's terms or find an absence of probable cause, the magistrate cannot certify the matter to the Secretary of State for extradition. If the case *is* certified to the Secretary for completion of the extradition process it is in the Secretary's sole discretion to determine whether or not extradition should proceed further with the issuance of a warrant of surrender. *See* 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW, § 316, pp. 49-50 (1942); Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313, 1323 (1962).

The government cannot take a direct appeal from the magistrate's decision *not* to certify the case. There also is no statutory provision for direct appeal of an adverse ruling by a person whose extradition is sought. Instead, that person must seek a writ of habeas corpus. *Collins v. Miller*, 252 U.S. 364 (1920); *Greci v. Birknes*, 527 F.2d 956 (1st Cir. 1976). The scope of habeas corpus review in extradition cases is a limited one, according due deference to the magistrate's initial determination. *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925). *See In the Matter of Assarsson*, No. 79-1689, slip op. at 6 (7th Cir. Oct. 31, 1980); *Laubenheimer*

v. Factor, 61 F.2d 626 (7th Cir. 1932); *Ornelas v. Ruiz*, 161 U.S. 502 (1896). The district judge is not to retry the magistrate's case.

"[H]abeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by a somewhat liberal extension, whether there is *any evidence* warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez v. Phillips*, 268 U.S. at 312 (per Holmes, J.) (emphasis supplied). The magistrate is obliged to determine whether there is probable cause to believe that an offense was committed and that the defendant committed it. 18 U.S.C. § 3184; *Benson v. McMahon*, 127 U.S. 457, 462-63 (1888); M. C. BASSIOUNI, INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER 516-18 (1974) (hereinafter cited as "BASSIOUNI"). The extradition process has not been challenged in this case by petitioner, but the government has raised a question about the scope of the magistrate's authority.

II. Probable Cause

Petitioner first challenges the sufficiency of the evidence to sustain the magistrate's finding of probable cause. Our scope of review on this issue is limited to determining whether there is "any evidence" to support the magistrate's finding of probable cause. We conclude that the magistrate's determination was supported by sufficient evidence.

Petitioner's hearing before the magistrate lasted seven days. During the hearing sworn statements of Jamil Yasin, Mufida Jaber and Israeli Police Captain Peretz were introduced as evidence. The admissibility of those exhibits was not challenged by petitioner.

According to Yasin's statement, Yasin and petitioner traveled to Tiberias on May 11, 1979 for "reconnaissance" purposes in connection with their membership in the PLO. The two men were scouting for a location in which to place a bomb. On May 14, the celebration day of Israel's Independence, Yasin prepared an explosive charge which he gave to petitioner with an explanation as to its operation.

Petitioner left Yasin's home for Tiberias at 9:00 a.m. on May 14 with the charge, and returned about 4:30 p.m. Petitioner went alone to Tiberias because he was concerned that Yasin might be recognized since "there were many people who knew [him]." Government Exhibit 1, "Statement by Yasin." Yasin gave petitioner instructions to place the bomb in a public area, and cautioned him to avoid military vehicles. On his return from Tiberias, petitioner told Yasin that he put the charge in a refuse bin in the center of town. The next day, May 15, Yasin met with petitioner and told him of news reports of the bomb's explosion in Tiberias, stating "the operation had succeeded." The substance of those events was also supported by the statement of Captain Peretz, the head of a special Israeli police team investigating the bombing. On May 7, 1979 Yasin, according to his statement, sent a letter to petitioner which was delivered by Yasin's cousin, Mufida Jaber. Yasin sent the letter after hearing that a person named "Ataf" had been arrested. In her sworn statement Mufida Jaber describes the contents of the note as: "To Ziyad, Talila, Jan and Umm Ammar, has been caught. Be careful." (Petitioner is known by the names Ziyad and Talila.) After reading the message, petitioner told Jaber that he wanted to go to America through Amman, Jordan. On May 20, 1979 petitioner obtained a visa to the United States, and on June 5 he crossed into Jordan with an Israeli transit permit, arriving in Chicago, Illinois, on June 14, 1979. In Chicago, petitioner took up residence with his sister and her husband, Ahmad Yusuf.

On August 17, 1979 agents of the Federal Bureau of Investigation (FBI) went to Yusuf's residence with a warrant for the arrest of petitioner. The agents advised those present of the warrant, mistakenly stating that the request for petitioner's arrest came from Jordan, not Israel. Petitioner was present but lied to the agents about his true identity, giving the name of Kamal Yusuf. At the agents' request, petitioner and another man who was also present accompanied the agents to the FBI field office, where both were fingerprinted and photographed before being taken back to Yusuf's. The FBI subsequently received fingerprints from Israel which matched those taken from "Kamal Yusuf," who was in fact the petitioner. The

agents returned to the Yusuf residence on August 12, 1979 to arrest petitioner, but he was no longer there. When informed of the legal consequences of harboring a fugitive, Ahmad Yusuf, petitioner's brother-in-law, who first claimed he did not know where petitioner was, made telephone calls, one in Arabic and one in English, in the second of which he was heard to say he wanted petitioner to come to his apartment to talk with Yusuf's attorney. A short time later petitioner arrived and was placed under arrest. In transit to the FBI office, petitioner said to one of the agents, "It's the Israeli's, not the Jordanians that want me." Up to that point the FBI agents had not informed petitioner of their earlier mistake regarding the country requesting the warrrant, but then confirmed that the petitioner was correct about which country sought his extradition.

As noted earlier, Article V of the extradition Treaty provides that "Extradition shall be granted only if the evidence be found sufficient, according to the laws of the place where the person sought shall be found, . . . to justify his committal for trial. . . ." The first crucial question here, then, is whether evidence introduced at the hearing is sufficient to support the magistrate's finding of probable cause.

In this case we have the statement of Yasin, an accomplice, that petitioner planted the bomb in Tiberias. Although in this circuit we advise a jury to give accomplice testimony such weight as is felt it deserves and to consider it with caution and great care, accomplice testimony is nevertheless competent to support a finding of probable cause. Federal Criminal Jury Instructions, Seventh Circuit 1980, 3.22 Accomplice Testimony. Such evidence may be of particular importance in extradition cases where all the alleged criminal activity occurred in a distant country. In *Curreri v. Vice*, 77 F.2d 130, 132 (9th Cir. 1935), the court, in the context of an extradition proceeding, stated that "the testimony of an accomplice is, next to the confession of the defendant, the most satisfactory kind of evidence that can be produced as to the guilt of the defendant." An accomplice's accusations are not automatically in-

competent to support a determination of probable cause, as petitioner would have it.[5]

Yasin's statements inculpated both himself and petitioner in the commission of the bombing. Yasin's statements were admissions against his own penal interest and are deemed reliable. *United States v. Harris*, 403 U.S. 573, 583-84 (1971); *United States v. Boyce*, 594 F.2d 1246, 1249 (9th Cir. 1979). The prejudice to Yasin in making the statement strengthens its supportive character.

Quite apart from the prejudice to Yasin and his knowledge of the events of the bombing and petitioner's departure, there are additional reasons for crediting the accomplice's statements. The statement of Captain Peretz corroborates Yasin's statements as to the cause, timing, place and occurrence of the explosion in Tiberias. Mufida Jaber's statement corroborates Yasin as to Yasin's communication to petitioner that they were in danger, and petitioner's subsequent departure to the United States. Where an accomplice's testimony is corroborated by further facts there is sufficient evidence to find probable cause. *United States v. Harris, supra; United States v. Boyce, supra.*[6]

Furthermore, Yasin's statements are corroborated by the acts of petitioner himself. When first asked his identity by FBI agents, petitioner gave a false name, thereby concealing his identity and, at least temporarily, evading arrest. When subsequently apprehended, peti-

[5] The uncorroborated testimony of an accomplice has been held sufficient to support even the higher reasonable doubt standard necessary for a criminal conviction. *Suhl v. United States*, 390 F.2d 547 (9th Cir. 1968) (testimony of accomplice sufficient even though inconsistent with only evidence connecting defendant with offense). *See United States v. Lee*, 506 F.2d 111 (D.C. Cir. 1974) (conviction may rest solely on uncorroborated testimony of an accomplice); *United States v. Green*, 446 F.2d 1169 (5th Cir. 1971) (no absolute rule of law preventing convictions on the testimony of an accomplice).

[6] The issue of corroboration generally arises in the context of search warrants; however, the same standards are applicable to the issuance of an arrest warrant. *See Giordenello v. United States*, 357 U.S. 480, 485-86 (1958).

tioner, unprompted, advised FBI agents that it was the Israelis rather than the Jordanians that issued the warrant for him. That petitioner concealed his identity and moved to a different address in Chicago permits an inference of his guilt. Flight also is a legitimate ground from which to infer guilt and here, at the least, lends itself to use as corroboration of Yasin's statement in the consideration of probable cause. *See Rowan v. United States*, 277 F. 777 (7th Cir. 1921) (evidence of flight admissible since its probative value is to indicate a consciousness of guilt); *Kanner v. United States*, 34 F.2d 863, 866 (7th Cir. 1929) (evidence of flight and assumption of false name admissible); *United States v. Dalhover*, 96 F.2d 355, 359 (7th Cir. 1938); *Currie v. Vice*, 77 F.2d 130, 133 (9th Cir. 1935); *United States v. Heitner*, 149 F.2d 105, 107 (2d Cir. 1945); *Green v. United States*, 259 F.2d 180, 182 (D.C.Cir. 1958). That petitioner likewise knew it was the Israelis who sought him also tends to support some inference of guilt. On these facts, the statements of Yasin, an accomplice, corroborated by statements of an investigating police officer and Yasin's cousin, Jaber, and by inferences that may be drawn from petitioner's own conduct of concealment and flight are sufficient to support the magistrate's finding of probable cause.

Appellant contends that the magistrate erred by refusing to admit statements in which Yasin and Jaber allegedly recanted their earlier statements regarding petitioner's role in the bombing. We disagree. An accused in an extradition hearing has no right to contradict the demanding country's proof or to pose questions of credibility as in an ordinary trial, but only to offer evidence which explains or clarifies that proof. *Shapiro v. Ferrandina*, 478 F.2d 894, 905 (2d Cir.), *cert. dismissed*, 414 F.2d 884 (1973). To do otherwise would convert the extradition into a full-scale trial, which it is not to be. "[T]he extradition proceeding is not a trial of the guilt or innocence [of petitioner] but of the character of a preliminary examination. . . ." *Jimenez v. Aristeguieta*, 311 F.2d 547, 556 (5th Cir. 1962). The inculpatory statements of Yasin and Jaber were made before an Israeli police officer. The statements were transcribed in Hebrew and were subsequently sworn to be true and correct before an Arabic speaking judge of the Magistrate's

Court of Jerusalem. The judge conversed with Yasin and Jaber in their native Arabic and determined that the witnesses understood their statements and that the statements were made of their own free will.[7] Petitioner's offer of proof, which was rejected by the magistrate, consists of declarations by Yasin and Jaber in which each recants prior detailed testimony implicating petitioner in the bombing. These declarations were made to private counsel while Yasin and Jaber were being held in prison. Both Yasin and Jaber declared that the inculpatory statements were made under the mistaken belief that petitioner could not be harmed by the statements because he was outside the country. The later statements do not explain the government's evidence, rather they tend to contradict or challenge the credibility of the facts implicating petitioner in the bombing. Therefore, the magistrate properly decided that such a contest should be resolved at trial in Israel.[8] The alleged recantations are matters to be considered at the trial, not the extradition hearing.

Petitioner also challenges the magistrate's rejection of statements claiming that petitioner was in Ramallah on the day of the bombing. This evidence directly contradicts the

[7] We find no merit in petitioner's suggestion that the confessions were inherently suspect by virtue of being transcribed in Hebrew as opposed to the declarants' native Arabic. The magistrate considered this fact along with statements by Judge Shabtay of the Magistrate's Court of Jerusalem that he questioned Yasin and Jaber in Arabic and determined that they understood their statements and made them of their own free will.

[8] Petitioner relies on *Application of D'Amico*, 185 F. Supp. 925 (S.D.N.Y. 1960), for a rule that evidence that an accomplice has recanted his testimony is always admissible in an extradition proceeding because the probative value of such testimony is "thin." However, petitioner's characterization of the decision in *D'Amico* is inaccurate. In that case the evidence of recantation already had been admitted by the magistrate. The district court on habeas corpus review had no opportunity to consider whether or not the evidence of recanting was properly on the record, and therefore made no determination on the issue. The district court in *D'Amico* remanded the case to the magistrate because it was unclear whether or not the magistrate had made a specific determination on the issue of probable cause.

government's proof that petitioner placed a bomb in a trash bin in Tiberias on the same day. "[E]vidence of alibi or of facts contradicting the demanding country's proof or of a defense such as insanity may properly be excluded from the Magistrate's hearing." *Shapiro v. Ferrandina*, 478 F.2d at 901 (1973). Thus, the magistrate in the case before us correctly refused to admit the evidence.[9] This evidence also is a matter for consideration at the trial, not the extradition hearing.

III. Treaty Construction

Because petitioner's remaining arguments implicate political concerns, it is essential that we explore the significance to extradition of crimes arising in a political context. Most treaties list categories of crimes or specific offenses for which extradition may be requested. There usually are, however, exceptions to the crimes contained in the list. Many treaties include "political crimes" among those exceptions. The traditional extradition treaty language that deals with the political context of crimes excepts from the treaty crimes that are "of a political character." The Treaty involved in this case uses the traditional language, and like most other similar treaties does not further define its terms.

Petitioner notes that courts around the world have recognized analytically separate kinds of political offenses, termed "pure" and "relative." A "pure" political offense is

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[9] Petitioner also urges that reports alleging torture in Israeli prisons should have been admitted to explain the circumstances of Yasin's confession. Petitioner offered no proof that Yasin himself suffered any mistreatment. We are asked to take judicial notice that Israel routinely tortures prisoners, an invitation we decline. Judicial notice could be taken only of a matter not reasonably subject to dispute and which is generally known to the court, or otherwise is capable of accurate and ready determination by sources that cannot reasonably be questioned. *Cf.* Fed. R. Evid. 201 (judicial notice in contexts other than extradition). We note that the reports of various organizations which petitioner brings to our attention were not themselves all unanimous in their findings; some contain both majority and minority conclusions. No aspect of this situation lends itself to judicial notice.

an "act that is directed against the state but which contains none of the elements of ordinary crime," such as sedition, treason and espionage. Garcia-Mora, *The Nature of Political Offenses: A Knotty Problem of Extradition Law*, 48 VIRGINIA L. REV. 1226, 1230, 1237 (1962) (hereinafter cited as "Garcia-Mora"). A "relative" political offense is one "in which a common crime is so connected with a political act that the entire offense is regarded as political." *Id.* at 1230-31. Petitioner argues that he should not be extradited because the crime with which he is charged constitutes a relative political offense, and that the political overtones of the act outweigh the elements of common crime. The government, in addition to disputing petitioner's argument, urges this court to hold that the determination of the political nature of the crime is itself a political question which should be the sole responsibility of the "political branches" (i.e., Congress and the Executive)[10] to decide, not the Judicial branch. The government also contends that the Treaty itself places sole authority to make the determination of a "political offense" in the hands of the Executive. It therefore becomes necessary to interpret the meaning of the "political offense" exception.

A. Authority to Determine Extradition Issues as a Matter Within Sole Discretion of Political Branches

The government's argument that the Political Branches should decide the question of whether the crime charged is a "political offense" under the Treaty has no basis in United States case precedent.[11] The government's contention, however, points up an apparent anomaly in the American law of extradition. It is the settled rule that it is within the

[10] *See Chicago & Southern Airlines v. Waterman Corp.*, 333 U.S. 103 (1948).

[11] The only case with any similarity which we have found that permits the Executive to make the initial determination in extradition matters that the crime charged was committed and that the person sought to be extradited committed it, *Sayne v. Shipley*, 418 F.2d 679 (5th Cir. 1969), involved a treaty that implicated the "special relationship between the Canal Zone and the Republic of Panama." *Id.* at 686. The court indicated, however, that any Executive determination to extradite still would be subject to review on habeas corpus.

Secretary of State's sole discretion to determine whether or not a country's requisition for extradition is made with a view to try or punish the fugitive for a political crime, i.e., whether the request is a subterfuge. *In re Lincoln*, 228 F. 70 (E.D. N.Y. 1915), *aff'd per curiam*, 241 U.S. 651 (1916); Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313, 1323 (1962). In contrast, the Judicial branch has consistently determined whether or not the "political offense" provision applies to the crime charged, presumably relying upon the language in 18 U.S.C. § 3184. That section requires a hearing to determine whether there is sufficient evidence "to sustain the charge *under the provisions* of the proper treaty." (Emphasis supplied.)[12] We have not found any case where an American court declined to consider the applicability of the political offense exception when it was squarely presented. If anything, one of the major criticisms leveled at American extradition law is that federal courts have tended to invoke the political acts exception in situations of common crimes mixed with political overtones upon a showing of "any connection, however feeble" to an uprising or rebellion or condition of domestic violence. *See* Garcia-Mora at 1244; I. A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 171 (1971) (hereinafter referred to as "SHEARER").

Congress originally made the determination that it is for the courts to decide how to apply the exception by making it a Judicial determination in the first instance as to whether or not the country requesting extradition had charged an individual with a crime "under the provisions of" a treaty. The Executive branch has, over the years, implicitly endorsed this approach.[13] The present system of American extradition perhaps may have

[12] A clause excepting political offenses is a "provision" of the treaty. *See generally* cases cited in Note, 62 COLUM. L. REV. at 1322, nn. 73, 74. *Compare Fernandez v. Phillips*, 268 U.S. 311, 312 (1925) (habeas corpus available to determine "whether the offense charged is within the treaty").

[13] Prior to the enactment of the original version of 18 U.S.C. § 3184, the Executive exercised complete control over extradition without reference to the courts. BASSIOUNI at 505. Thus, from 1794 to 1842 the Executive had unfettered discretion in this area.

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evolved as a way of providing the Executive some flexibility in decision-making by allowing it to defer to the Judiciary's decision, for example, to refuse extradition of an individual who the Secretary of State is reluctant to extradite anyway. This "permits the Executive Branch to remove itself from political and economic sanctions which might result if other nations believe the United States lax in the enforcement of its treaty obligations." Lubet & Czackes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J. CRIM. L. & CRIMINOLOGY 193, 200 (1980) (hereinafter cited as "Lubet & Czackes"). *See* SHEARER at 192; Note, *Bringing the Terrorist to Justice: A Domestic Law Approach*, 11 CORNELL INT'L L. J. 71, 74 (1978). With this background in mind, we consider whether the issues involved in applying the political offense exception are such that only the Executive should make the determination.

The government does not direct our attention to a specific constitutional provision that could be invoked to guide a resolution of this issue which, the government says, does not lend itself to judicial application. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 75 (1978) (hereinafter referred to as "TRIBE"). Instead, the government emphasizes the constitutional commitment of foreign policy and international affairs decisions generally to the Executive, and suggests that the political nature of those areas renders them unsuitable for judicial consideration. But, as the Supreme Court has said, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial competence." *Baker v. Carr*, 369 U.S. 186, 211 (1962). This court must decide whether the present case contains elements of foreign policy that do lie beyond judicial competence, and if so, whether that justifies a rule that precludes judicial consideration of similar treaty provisions in all cases.

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[13] *continued*
Immediately upon the statute's enactment, the Executive began a policy of deference to the role of the Judiciary as mandated by Congress. *See* 4 OP. ATT'Y GEN. 201 (1843).

We disagree with the government's argument relying on *Baker v. Carr*, 369 U.S. at 217, that construing application of a treaty's political offense exception clause requires "an initial policy determination of a kind clearly for nonjudicial discretion." It is clear that courts have authority to construe treaties. *See* TRIBE at 76, n. 35. In the absence of an Executive determination that a treaty has been terminated, a court may consider the issues raised when it is asked to apply the treaty: the Court "can construe [the] treaty and may find it provides the answer." *Baker v. Carr*, 369 U.S. at 212. *See* J. NOWAK, R. ROTUNDA & J. N. YOUNG, CONSTITUTIONAL LAW 104 (1978); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 210-16 (1972).

The government stresses the unique resources available to the Executive to aid its determination of the political situation in foreign lands. But the State Department can and has made it a practice to share that information with courts during extradition proceedings. *Cf.* Baldwin, *The Foreign Affairs Advice Privilege*, 1976 WISCONSIN L. REV. 16 (Secretary of State may withhold certain foreign affairs information from Congress). In extradition proceedings involving the political crime exception, one of the major questions for the magistrate is whether there existed violent political turmoil at the site and time of an individual's alleged illegal activities. The existence of a violent political disturbance is an issue of past fact: either there was demonstrable, violent activity tied to political causes or there was not.[14] The resources to make that initial

[14] This distinguishes the cases cited by the government that confer sole discretion on the Executive to determine when a state of war or belligerency exists in another country. *In re Cooper*, 143 U.S. 472 (1892); *The Three Friends*, 166 U.S. 1 (1897); *Underhill v. Hernandez*, 168 U.S. 250 (1897). In those situations a court would be unable definitively to say that a specific level of hostility had been reached. When considering the political offense exception, a court need consider only whether some incidents of political violence have occurred, and not whether the violence has risen to a particular level.

We note especially the following language from *In re Cooper*:

> We are not to be understood, however, as underrating the weight of the argument that in a case involving private

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determination can ordinarily be sufficiently produced for judicial consideration. *In camera* review is available for sensitive evidence. In this case an assistant legal advisor for the State Department's Office of Combatting Terrorism, an authorized spokesman for the Department, did appear and testify. Mr. Fields explained that "It is the view of the Department of State that indiscriminate use of violence against civilian populations, innocent parties, is a prohibited act, and as such, is a common crime of murder, punishable in both states." There was additional evidence offered by the Department of State concerning the positions consistently taken by our high government officials in regard to terrorism. The official Executive view was made known to the magistrate. Even though we do not leave sole determination to the Executive branch, we believe its views are entitled to great weight in extradition matters.

The government also expresses concern over the possibility that a court's pronouncements on certain subjects may conflict with the Executive's and embarrass this country's conduct of its foreign policy. In particular, the government points to petitioner's claim that in order to con-

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[14] *continued*

rights, the court may be obliged, if those rights are dependent upon the construction of acts of Congress *or of a treaty*, and the case turns upon a question, public in its nature, which has not been determined by the political departments in the form of a law specifically settling it, or authorizing the executive to do so, to render judgment, "since we have no more right to decline the jurisdiction which is given than to usurp that which is not given."

143 U.S. at 503 (emphasis supplied). The question, then, is not so settled at the government suggests, since there is no extradition statute specifically authorizing the Executive to make the determination whether the political offense exception applies, nor is there a statute defining the term.

We also note that *The Three Friends* case makes specific mention of the numerous legal consequences of declaring a "state of belligerency," which include impacts on the conduct of commerce and even the war power, 166 U.S. at 63. We emphasize that there has been no showing that such broad legal consequences would obtain in the case before us upon a finding that political upheaval is occurring in Israel.

sider the political aspects of his alleged actions a court must "recognize" the PLO as a legitimate political group, a position the United States has not taken. We agree with the government when it says "[t]hat decision should only be made by those directly responsible for overseeing our foreign relations." However, the formulation of the political offense exception does not require any such "recognition." It requires only the recognition that there occurred violent acts and political tensions that resulted in the charged criminal acts. That determination does not give rise to a direct conflict: in most cases there is no real contention about the existence *vel non* of political violence in the requesting country.

The government's concerns seem directed to whether the Judiciary will recognize a given sort of violence as falling within the protection of the political offense exception, thus implicitly conferring on certain actions a status with which the Executive might disagree. We point out that the Judiciary's conclusions may differ from the Executive's in many areas of law, yet that does not mean that whenever the courts might disagree with the Executive the issue thereby becomes a non-justiciable "political question."[15] To some extent, "all constitutional interpretations have political consequences," R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM 56 (1955), and indeed the same follows from any treaty interpretation. We recognize the need for special sensitivity in areas such as our government's foreign relations conduct, but that sensitivity does not preclude the Judiciary from having a part in the process of determining whether the political offense excep-

[15] We also note that the Judiciary has made numerous decisions that touch our nation's domestic and foreign policy concerns and implicate matters that traditionally are thought of as Executive functions—on occasion to the chagrin of the latter branch. *See New York Times Co. v. United States*, 403 U.S. 713 (1971) (permitting publication of Pentagon Papers in face of argument of threat to relations with allies); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (restricting Executive discretion against claim of necessity to further international military policy). *See also Dennis v. United States*, 341 U.S. 494 (1951) (appraisal of international tensions and conditions in evaluating constitutionality of statute).

tion applies. That determination involves an approach to factfinding that is traditional to the courts.

We also disagree with the government's argument that there are no judicially discoverable and manageable standards to guide the court's discretion. For better or worse, the extradition statute requires the magistrate to determine that the crime alleged is listed in the applicable treaty, and that the provision of the treaty relating to political offenses does or does not apply. Before an act may constitute a political offense, there must be two basic determinations made by the magistrate: that there was a violent political disturbance in the requesting country at the time of the alleged acts, and that the acts charged against the person whose extradition is sought were recognizably incidental to the disturbance. The magistrate's *legal* determination that a person is extraditable does not bind or control the Secretary's later *political* conclusion. *In re Ezeta*, 62 F. 972 (N.D. Cal. 1894). On the other hand, if the magistrate concludes that the individual is not extraditable, it is up to the Secretary to decide whether or not to pursue the issue before another magistrate, as in *In re Gonzalez*, 217 F. Supp. 717 (S.D. N.Y. 1963). The Secretary, it appears, contrary to general practice, has been permitted to shop for a more receptive magistrate.

In order to assure that there is adequate protection of the rights of an individual whose extradition is requested, "[p]urely as a practical matter it would seem reasonable for the courts of this country to make an initial finding of extraditability of particular offenses." *Shapiro v. Ferrandina*, 478 F.2d 894, 906 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973). As Judge Friendly stated in the *Shapiro* case, "we see little reason why a prior judicial determination would be viewed by [the Secretary of State] as an unwarranted intrusion upon executive power." *Ibid.* *See* Sharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L. J. 517, 584 (1966) (courts are cautious about invoking political question doctrine where important individual rights are at stake). *Cf.* Kutner, *World Habeas Corpus and International Extradition*, 41 U. TOLEDO L. J. 525, 532 (1964) (Secretary of State's power of ultimate

determination not to extradite, despite court certification, shows latitude democracy allows in concern for individual rights).

The government stresses that courts have refused to look at the requesting country's motives to determine if extradition for a common crime is sought merely as a subterfuge for trying an individual for political crimes, *see Garcia-Guillern v. United States*, 450 F.2d 1189 (5th Cir. 1971), even in the presence of an express provision of the treaty, such as the one in the Treaty before us. This raises the logical question of why the Executive's authority is "virtually untrammelled"[16] in that area, but is subject to an initial decision by the Judiciary on the applicability of the political offense exception.

The different approaches taken on political offense and "subterfuge" issues are not so anomalous as the government suggests. In considering the presence of a political offense, the court determines whether the crime charged stemmed from political violence. To make that determination, the magistrate need look only to the facts supporting the extradition request for evidence as to whether or not violent political activity was unfolding at the time to which the facts relate, and of the individual's recognizable connection to that violence. Compared to that, evaluations of the motivation behind a request for extradition so clearly implicate the conduct of this country's foreign relations as to be a matter better left to the Executive's discretion. The Executive's evaluation would look at the actual operation of a government with which this country has on-going, formal relations evidenced by the extradition treaty and imply that the government may be disingenuous. This obviously would be an embarrassing conflict over assumptions essential to our foreign relations about the integrity of governments with which the United States deals. A judicial decision, however, that establishes an American position on the honesty and integrity of a requesting foreign government is distinguishable from a judicial determination that certain events occurred and that specific acts of an individual were or were not connected to those events. The

[16] Note, *Executive Discretion in Extradition*, 62 COLUM. L. REV. 1313, 1323 (1962).

latter type of decision simply categorizes the facts involved in a given case and then construes the treaty to determine whether or not the facts fall within its ambit. Thus, the Judiciary's deference to the Executive on the "subterfuge" question is appropriate since political questions would permeate any judgment on the motivation of a foreign government.[17]

It should be emphasized, however, that the government's argument on this point is not without some merit. If our long established extradition process is thought to need some overhauling, it is for the Congress to consider, not the courts.

B. Treaty Language: Discretion to Determine Political Nature of Offense Within Sole Discretion of Executive Branch

The government argues that the Treaty, by its own terms, leaves to the sole discretion of the Executive branch the determination whether or not an alleged act for which extradition is sought is of a political nature. In support of its argument, the government cites the text of the Treaty: "Extradition shall not be granted . . . When the Offense is regarded *by the requested Party* as one of a political character. . . ." Art. VI, par. 4 (emphasis added). The government contends that the words "requested Party" refer only to the Executive branch, citing *Berenguer v. Vance*, 473 F. Supp. 1195 (D.D.C. 1979). We conclude that the *Berenguer* case is inapposite and that the government's contention lacks sufficient merit to justify a holding in its favor on this issue.

In *Berenguer*, Italy had obtained Berenguer's extradition from the United States through normal channels for trial on certain defined crimes. Once Berenguer was in Italy, that country asked the State Department to expand the list of charges for which he could be tried. This request was necessary because a principle of

[17] *Compare* the "Act of State" concept, which says that "the courts of one nation will not sit in judgment on the acts of the government of another done within [the latter's] own territory." *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

international law known as the "doctrine of specialty," which was explicitly incorporated in the treaty, states that the requesting country must seek permission of the "requested Party" before prosecuting or punishing an extradited party for any offense committed prior to extradition, except that for which he was extradited. Berenguer claimed that the State Department could not acquiesce to an extension of the original charges absent a new hearing before an American magistrate. The district court disagreed, noting that once Berenguer was lawfully extradited and had arrived in Italy he was no longer subject to the jurisdiction of United States courts and his American due process rights no longer controlled his case. 473 F. Supp. at 1198. Expansion of the list of crimes for which he could be tried became a matter of state to be decided by the Executive branches of the two nations. That court also noted that the language of the treaty did not specify a procedure to guide the decision on expanding the list of crimes for which Berenguer could be tried. Thus, the district judge held that the decision was left to the State Department. To that limited extent, the government is correct when it argues that the district court in *Berenguer* held that the term "requested Party" refers to the Executive branch, since there was an absence of statutory or treaty language "requiring a second judicial hearing once extradition has been accomplished." *Id.* at 1197. But the court in *Berenguer* explicitly noted that *before* extradition is accomplished, there must be a hearing before a magistrate to determine whether there is probable cause to believe the person committed a crime for which he could be extradited under the terms of the treaty. *Id.* at 1196.[18] The district court's careful distinction in that

[18] *Compare Sabatier v. Dabrowski*, 586 F.2d 866, 869 (1st Cir. 1978), where the court says the extradition hearing is limited, *inter alia*, "merely to ascertain whether a treaty applies. . . ." The government cites both the *Sabatier* and *Berenguer* opinions in support of the argument that the courts may only make a determination on the issue of probable cause, which in the government's view excludes judicial application of the political offense exception. As we discuss in an earlier part of this opinion, it has been the law of extradition in this country that the probable cause hearing

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case between extradition decisions made before and after actual extradition counsels against our expanding the *Berenguer* holding to read the term "requested Party" in extradition treaties as always referring solely to the Executive branch.

As the district court stated in *Berenguer*, one constant in American extradition law is that the magistrate is to make the initial determination in the extradition process. We hesitate to hold on so slim a record as is available on the intent of the drafters of the Treaty in this case that the major "procedural safeguards established to protect the defendant's rights" in extradition, *id.* at 1198, have been deliberately written out of the document, although the treaty language lends some support to that interpretation. Our caution is reinforced when we note that the only case we have found that holds the Executive branch entitled to make the initial extradition decision subject only to later habeas corpus review, *Sayne v. Shipley*, *supra* n.11, did so in the narrow context of an extradition treaty arising from the "special relationship between the Canal Zone and the

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[18] *continued*
comprehends a determination that the crime charged is one "under the provisions of" the treaty (*i.e.*, that it is not a political offense). 18 U.S.C.§ 3184. While the portion of the *Sabatier* opinion quoted in this footnote, if read alone, may be construed to support the government's view, when read in context of that opinion and of general principles governing extradition, it suggests quite a different view. At the outset of the opinion, 586 F. Supp. at 868, the court quotes the Supreme Court in *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925), for the proposition that the magistrate is to determine "whether the offense charged is within the treaty," language which tracks that of § 3184 both in form and meaning. Since the *Sabatier* court was not presented with an issue implicating an exception to the treaty, it is hardly surprising that later in the opinion the court did not specifically refer to broader duties of the magistrate during the extradition hearing. The same appears to be true in *United States v. Clark*, 470 F. Supp. 976 (D.C. Vt. 1979), which cites *Sabatier* for the more narrow definition of "its role in this proceeding." *Id.* at 978. The *Sabatier* and *Clark* opinions merely re-state the statutory framework that leaves to the Judiciary the initial determination whether the political offense exception applies.

Republic of Panama." 418 F.2d at 686. No similar "special relationship" exists between the countries who are parties to the Treaty before us.

C. Extradition Request as a Subterfuge

Petitioner claims that Israel seeks his extradition on charges of common crimes in order to try him for his political beliefs. Thus, he says, he should not be extradited, even though all proceedings in Israel concerning this case have been conducted in civil, not military, court.

The determination in this case whether or not the request for extradition on common crimes amounts to a subterfuge by Israel to punish petitioner for a political offense is, as we have clearly noted, a decision within the sole province of the Secretary of State. *Laubenheimer v. Factor*, 61 F.2d 626 (7th Cir. 1932); *In re Lincoln*, 288 F. 70 (E.D.N.Y. 1915), *aff'd per curiam*, 241 U.S. 651 (1916); *Sindona v. Grant*, 461 F. Supp. 199 (S.D.N.Y. 1978). As should be clear from our earlier discussion, petitioner's claim is without merit, since this court has no jurisdiction to determine the requesting country's motives under this Treaty.

IV. Political Offense Exception

The operative definition of "political offenses" under extradition treaties as construed by the United States limits such offenses to acts committed in the course of and incidental to a violent political disturbance such as a war, revolution or rebellion. SHEARER at 178-81; Cantrell, *The Political Offense Exemption in International Extradition: A Comparison of the United States, Great Britain and the Republic of Ireland*, 60 MARQUETTE L. REV. 777, 795-97 (1977) (hereinafter referred to as "Cantrell"); *Escobedo v. United States*, 623 F.2d 1098 (5th Cir.), *cert. denied*, 49 U.S.L.W. 3421 (Dec. 9, 1980); *Sindona v. Grant*, 619 F.2d 167 (2d Cir. 1980); *Ramos v. Diaz*, 179 F. Supp. 459 (S.D. Fla. 1959); *In re Ezeta*, 62 F. 972 (N.D. Cal. 1894). Petitioner argues that it is apparent that the crime with which he is charged is a political offense because there was and is a conflict in Israel that involves violence, and the PLO, to which petitioner allegedly belongs, is a party to that violence.

Petitioner notes that generally the motivation of the individual in committing the alleged crime is not an issue in the extradition proceeding. Lubet & Czackes at 203. "[T]he nature of the offense does not depend on the motives of the actor just as [the] nature of the offense may not confer upon the actor certain motives that were not present at the commission of the violation." BASSIOUNI at 378. However, petitioner maintains "that American courts will seize upon the slightest connection between the crime and political act or objective in order to find a political offense." Cantrell at 795. Thus, petitioner asserts that he cannot be extradited because Israel's allegation of his membership in the PLO is enough to bring his alleged role in the bombing within the scope of the political offense exception. Petitioner's characterization of the American law of extradition is facially plausible. But, like most generalizations about complex legal areas, there is much detail that petitioner's position fails to take into account.

The United States law of extradition has been severely criticized for not having progressed from its origins in nineteenth century British law. *See, e.g.*, SHEARER at 181. In particular, it has been asserted that the "narrow interpretation" of the political offense exception which rejects consideration of the motivations behind an alleged crime "may be characterized as both underinclusive and overinclusive, as it tends to exempt from extradition all crimes occurring during a political disturbance, but no offenses which were not contemporaneous with an uprising. . . . [T]he overinclusive aspect of the approach may operate to protect common criminals simply because their crimes occur during times of political disorder." Lubet & Czackes at 203, 204. Such a narrow approach "can result in grave abuse" of treaty exceptions for political offenses. Cantrell at 795. While we keep these concerns in mind, we conclude that existing law is sufficiently flexible to avoid such abuses.

The weakness of the approach attributed to American courts is apparent in the case before us. Petitioner consistently has tried to establish that there exists in Israel a state of conflict in the nature of a war, revolution or rebellion. This, he contends, establishes the propriety of

using the political offense exception in this case. The magistrate refused to take judicial notice of the existence of a state of political and military conflict between Israel, its neighboring states and national liberation movements in the Middle East. The magistrate did, however, receive evidence on "the nature of the conflict in the Middle East before, during and after the 1948 proclamation of a State of Israel . . . as well as the 1967 occupation by Israel of the West Bank of the country of Jordan. . . ." *In re Abu Eain*, No. 79 M 175 (N.D. Ill. Dec. 18, 1979) (Mem.) at 14. It appears that the magistrate may have assumed that a conflict existed at the time of petitioner's alleged acts since her subsequent discussion on the applicability of the political offense exception went mainly to issues that usually are considered only after a determination of a violent political disturbance has been made.

There remains, however, some question as to whether that finding of a "conflict" is sufficient to establish that there exists in Israel "a violent political disturbance, such as a war, revolution or rebellion." The nature of that conflict is somewhat different than disturbances that have been considered in other cases where resistance to extradition on grounds of a political offense exception has been sustained. Those cases involved on-going, organized battles between contending armies, a situation which, given the dispersed nature of the PLO, may be distinguished. *See, e.g., Ramos v. Diaz*, 179 F. Supp. 459 (S.D. Fla. 1959) (members of organized revolutionary army with established chain of command operating within the country); *United States v. Artukovic*, 170 F. Supp. 393 (S.D. Cal. 1959) (military government installed by Nazis during World War II; discussed in dictum). Terrorist activity seeks to promote social chaos. Modern international terrorism is a phenomenon apart from the world's experience with more conventional expressions by individuals or groups of their dissatisfaction with world order. Such terrorism does not conveniently fit the categories of conflict with which the courts and the international community have dealt in the past. An on-going, defined clash of military forces may be significant because that is one backdrop which may bring into sharp relief an individual act of violence.

Once the circumstances move away from that context, the judiciary's task of determining what degree or type of violent disturbance permits a successful invocation of the political offense exception becomes more difficult. It also poses a different question of proof than otherwise may be involved. *See generally* Lubet & Czackes at 206, 208-10.

For example, the evidence in this case reveals that the PLO seeks the destruction of the Israeli political structure (Tr. 805) as an incident of the expulsion of a certain population from the country (Tr. 624, 672-73),[19] and thus directs its destructive efforts at a defined civilian populace. That, it could be argued, may be sufficient to be considered a violent political disturbance. If, however, considering the nature of the crime charged, that were all that was necessary in order to prevent extradition under the political offense exception nothing would prevent an influx of terrorists seeking a safe haven in America. Those terrorists who flee to this country would avoid having to answer to anyone anywhere for their crimes. The law is not so utterly absurd. Terrorists who have committed barbarous acts elsewhere would be able to flee to the United States and live in our neighborhoods and walk our streets forever free from any accountability for their acts. We do not need them in our society. We have enough of our own domestic criminal

[19] *See* "Covenant Against Israel," adopted by the Palestinian National Council in 1968 and discussed by one of petitioner's witnesses during the hearing before the magistrate. (Tr. 672-73). The document asserts that "Palestine" is the rightful homeland solely for "Palestinians." Article 6 of the Covenant then states that "Jews who were living permanently in Palestine until the beginning of the Zionist invasion will be considered Palestinians." A reading of the testimony of that witness, who was produced as petitioner's expert in this area, indicates that the document would mark the "Zionist invasion" as beginning in 1917 or 1922 (Tr. 615-20; 622-24; 632). Jews who arrived in Israel after those years would be unwelcome in the Palestinian state. Because they comprise the bulk of the present-day Israeli Jewish population, they are the targeted group of the "armed struggle" (Covenant, Article 9; Tr. 803) that the PLO wages.

violence with which to contend without importing and harboring with open arms the worst that other countries have to export. We recognize the validity and usefulness of the political offense exception, but it should be applied with great care lest our country become a social jungle and an encouragement to terrorists everywhere.

The magistrate, however, understood that the finding of violent upheaval at the time an allegedly political crime occurred was not the end of the analysis under the political offense exception. She went further and found that petitioner had failed to establish that the bombing was incidental to the PLO's objectives. The magistrate held that simply noting membership in the PLO, but not tying the membership to the specific act alleged was insufficient to satisfy the burden petitioner must shoulder in order to invoke the political offense exception. Absent a direct tie between the PLO and the specific violence alleged, the act involved here, without more, was not the sort which may be reasonably "incidental to" a political disturbance. Because the bombing was not shown to be incidental to the conflict in Israel, the magistrate held that it was therefore not an act covered within the political offense exception. We agree with her conclusion.

The reason that the bombing was not "incidental to" the conflict does not lie in the motivation for the act, since, for purposes of extradition, motivation is not itself determinative of the political character of any given act. Lubet & Czackes at 203 n.102. The definition of "political disturbance," with its focus on organized forms of aggression such as war, rebellion and revolution, is aimed at acts that disrupt the political structure of a State, and not the social structure that established the government. The exception does not make a random bombing intended to result in the cold-blooded murder of civilians incidental to a purpose of toppling a government, absent a direct link between the perpetrator, a political organization's political goals, and the specific act. Rather, the indiscriminate bombing of a civilian populace is not recognized as a protected political act even when the larger "political" objective of the person

who sets off the bomb may be to eliminate the civilian population of a country. Otherwise, isolated acts of social violence undertaken for personal reasons would be protected simply because they occurred during a time of political upheaval, a result we think the political offense exception was not meant to produce.

This policy long has been articulated in extradition cases of this and other nations in the context of terrorist activities, particularly those of anarchists. Although distinguishable in some respects, the case of *In re Meunier* [1894] 2 Q.B. 415, provides the earliest illustration of the principle under British law, from which the American law of extradition developed. France had requested the extradition of Meunier from England where he had traveled after allegedly bombing a cafe and army barracks in the cause of anarchy. In granting France's extradition request, the divisional court on habeas corpus discounted Meunier's claim that his activities aimed at terrorizing an entire population in order to subvert a government through social disorder fell within the political offense exception. The court first noted that the anarchist movement did not represent a party, in the usual sense of the term, "seeking to impose the Government of their own choice on the other [party]," 2 Q.B. at 419, a prerequisite for invoking the exception. Rather, the aim of the anarchists was to topple the formal political structure by destroying its supporting social fabric.[20] The anarchist's efforts were not directed at the government, but instead were "directed primarily against the separate body of citizens," *id.*, a form of political expres-

[20] We acknowledge that it may not be "textbook" political science and sociology to distinguish between disagreement with a government and with the society that establishes it. Nevertheless, as a practical matter it must be recognized that within every society there will be elements who are dissatisfied with their government. At times this dissatisfaction may be expressed, deliberately or by reason of an uncontrollable flare of temper, in violent acts that have an impact on private social interests. We do not have occasion in this case to consider the boundaries within which the political offense exception operates in these situations. We are concerned here only with a violent act focused at the *social* structure.

sion not protected under the political offense exception. As recent commentators have stated, "an offense having its impact upon the citizenry, but not directly upon the government, does not fall within the political offense exception." Lubet & Czackes at 202. *See* Costello, *International Terrorism and the Development of the Principle Aut Dedere Aut Judicare*, 10 J. INT'L LAW & ECON. 475, 501 (1975) quoting U. N. Secretariat study: "[T]he legitimacy of a cause does not in itself legitimize the use of certain forms of violence especially against the innocent").[21]

Anarchy presents the extreme situation of violent political activity directed at civilians and serves to highlight the considerations appropriate for this country's judiciary in construing the requirements of our extradition laws and treaties. But we emphasize that in this case, even assuming some measure of PLO involvement, we are presented with a situation that solely implicates anarchist-like activity, i.e., the destruction of a political system by undermining the social foundation of the government. The record in this case does not indicate that petitioner's alleged acts were anarchist-inspired. Yet the bombing, standing detached as it is from any substantial tie to political activity (and even if tied, as petitioner insists, to certain aspects of the PLO's strategy to achieve its goals), is so closely analogous to anarchist doctrine considered in cases like *In re Meunier*, as to be almost indistinguishable.

We have found no American cases that detract in any way from the applicability of the *Meunier* theory to the

[21] *Cf.* Note, *Bringing the Terrorist to Justice: A Domestic Law Approach*, 11 CORNELL INT'L L.J. 71, 82 (1978), discussing the Swiss concepts of "predominance" and "proportionality": "The criminal action must be 'immediately connected with its political object,' and the damage caused must not be out of proportion to the desired result." The parties did not argue the direct application of these concepts to American extradition law. While proportionality and predominance may be unarticulated concepts in the existing Anglo-American framework of extradition, we leave consideration of that question for another time.

case before us. The case that comes closest to challenging *Meunier*'s applicability is dictum contained in *United States v. Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959), one of the most roundly criticized cases in the history of American extradition jurisprudence. *See, e.g.*, Lubet & Czackes at 206-07; Garcia-Mora at 1246-47; Cantrell at 795-96. In *Artukovic*, the magistrate commented in dictum that he believed murders of civilians were political offenses when carried out pursuant to the orders of a Croatian government official who was serving at the time with the blessing of the Axis powers in World War II. Against the backdrop of confused and rapid shifts of wartime government, the magistrate felt, killings accomplished by various militia protecting each successive government constituted political acts. 170 F. Supp. at 392-93. The magistrate noted that orders for the killings were aimed at specific racial groups denominated "enemies" of the Croatian government, not at the general population. *Id.* at 390.

The reasoning in the *Artukovic* case (which of course is not binding precedent for this court) can be distinguished from the facts before us, since the acts constituting Artukovic's alleged offenses were carried out by a government in power, which was at least nominally seeking to eliminate its political "enemies." In the present case, the bombers could not discriminate between their victims. We note that the *Artukovic* court's dictum could not be challenged by the United States government on appeal, since the initial decision in extradition cases effectively terminates proceedings upon a finding that a person is not extraditable. And the actual holding in the case was that Artukovic could not be extradited since the government failed to show probable cause that he committed the crimes. We also note that the country which sought Artukovic's extradition had obtained a United States Supreme Court order vacating earlier judgments that found the political offense exception applicable to the case. *Karadzole v. Artukovic*, 355 U.S. 393 (1958).[22]

[22] *See* 170 F. Supp. at 383-86 for a full account of the *Artukovic* case's convoluted progress through the judicial system.

Other cases more sharply demonstrate the difference between the usual application of the political offense exception and the situation before us here. For example, the more usual situation occurred in *Ramos v. Diaz*, 179 F. Supp. 459 (S.D. Fla. 1959). The district judge conducting the initial extradition hearing pursuant to 18 U.S.C. § 3184 found that the killing of a political prisoner by two members of Castro's revolutionary army in Cuba (who had left that country after the revolution) was a political offense preventing extradition of the alleged killers upon request from Communist Cuba. The district judge noted that the victim was "one of many political prisoners captured in furtherance of the political uprising. The Defendants were under the command of the revolutionary forces engaged in mopping up operations as part of the revolution." 179 F. Supp. at 459. The situation thus was unlike petitioner's alleged actions in the present case, where the killings were done, so far as we can tell from the present record, without regard for political affiliation or governmental or military status of the victims.[23]

We note that even in the nineteenth century the United States Supreme Court indicated that the civilian status of victims is of significance when courts consider the political offense exception. In *Ornelas v. Ruiz*, 161 U.S. 502 (1896), the Court upheld a magistrate's determination that a raid on a Mexican village and its military garrison by more than a hundred men was not incidental to violent political disturbances that were

[23] As a collateral matter, petitioner claims there is no evidence that those who were killed and injured in the Tiberias bombing were civilians, and thus argues that discussion of their civilian status is inappropriate at all levels of this case. It should be pointed out that our discussion revolves around the population to which the violent act was directed. The fact that the explosive was placed on a busy public street during a public holiday in a resort city and that it is alleged petitioner said he would avoid all contact with the Israeli military makes it clear that the explosion was meant to snare civilian victims. In any event those killed were children. There is nothing in the record to suggest the possibility of any Israeli military involvement in any way.

occurring in Mexico at the time, as the raiders had claimed. The Court felt that the magistrate was justified in refusing to apply the political offense exception, "in view of the character of the foray, the mode of attack, the persons killed or captured, and the kind of property taken or destroyed." 161 U.S. at 511. The applicability of *Ruiz* to the present case is even more compelling when one notes that the raiders were later tried in Mexico for their participation in the revolution they claimed the raid had furthered. 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW, § 316, pp. 50-51 (1942). It is apparent that the Supreme Court viewed the raid as the sort of political activity that is not encompassed within the political offense exception, especially when the tie to a larger political cause was ambiguous in that specific instance.[24]

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[24] The extradition treaty involved in *Ornelas v. Ruiz* apparently excepted crimes of a "purely political" character from its scope. It might be argued that the Supreme Court simply was distinguishing "pure" political offenses (treason, sedition and espionage), which never are extraditable, *see* Lubet & Czackes at 200, from situations where a petitioner claims he is accused of committing "relative" political crimes (common crimes with political overtones), which may not be extraditable, but which pose more difficult problems of proof. However, American courts "read the political offense exception broadly enough to bring in relative offenses," Note, *Bringing the Terrorist to Justice: A Domestic Law Approach*, 11 CORNELL INT'L L. J. 71, 82 (1978), and the Supreme Court's discussion in *Ruiz* of the acts constituting the alleged crimes leaves no doubt that the specific treaty language made no difference to the political offense analysis: relative political crimes fell within the exception for "purely political" crimes. Otherwise, the Court need not have reviewed at length the specific acts alleged. A "pure" political offense exception clause, had it made any difference to the analysis, would have been determinative without further discussion.

At any rate, the only support we have found for a substantive distinction in American law between "pure" and "relative" political offenses under specific treaty language is contained in Garcia-Mora, 48 VIRGINIA L. REV. at 1232. However, Garcia-Mora goes on to cite an American treaty with language identical to that involved in this case, and says

(Footnote continued on following page)

We likewise conclude that the magistrate in this case was correct in holding that the alleged bombing directed at a civilian population was not incidental to political upheaval, however characterized, which was occurring at the time in Israel. Petitioner may not claim the benefit of the political offense exception clause contained in Article VI of the United States extradition Treaty with Israel.

CONCLUSION

We affirm the district court's conclusion that the magistrate was correct under the established law of this country in finding probable cause to believe petitioner guilty of the crime charged for which he could be extradited to Israel. However, the determination of whether the petitioner is actually guilty or not requires consideration of all the evidence at a trial within the jurisdiction where the act is alleged to have been committed. That is not for our courts to determine within the limitations of a probable cause hearing. We therefore uphold the magistrate's certification to the Secretary of State and the commitment of petitioner to jail[25] until he may be surrendered to Israel upon a

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[24] *continued*

the language applies to except from extradition only pure political crimes. If Garcia-Mora is correct, then petitioner automatically is extraditable, since no one argues here that the acts of which he is accused constitute pure political offenses. The point was not argued in this case.

[25] On January 19, 1981, petitioner filed in this court a motion entitled "Emergency Petition to Rule on Appellate Motion to Reconsider Bail." Petitioner has made previous applications for bail. The present motion, which reveals no emergency, but alleges substantial security for bail and reargues the merits of the case, is now moot.

warrant issuing from the proper authorities of that country's government.[26, 27]

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[26] The Secretary of State has two months from the date of commitment following final judicial action in this case to surrender petitioner to the proper Israeli authorities if the Secretary in his discretion determines that surrender is appropriate. 18 U.S.C. § 3188; *Jimenez v. U.S. Dist. Court for Southern Dist. of Florida*, 84 S. Ct. 14 (1963) (Goldberg, J., in chambers). The final decision of whether petitioner is ultimately to be surrendered or not lies with the Secretary and not with this court.

[27] Our holding in this case is not intended in any way to reflect a view one way or the other as to the merits or equities of any social or political problems existing between Israel and other parties. Those judgments are clearly far outside judicial bounds.

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

ZIYAD ABU EAIN,

Petitioner,

v.

No. 79 C 5477

JOHN J. ADAMS, United States Marshal for the Northern District of Illinois,

Respondent.

MEMORANDUM OPINION AND ORDER

On August 21, 1979, petitioner was arrested pursuant to the magistrate's warrant issued in connection with a State of Israel request for his extradition. The magistrate held extradition hearings pursuant to 18 U.S.C. §3184 comprising seven days of testimony. On December 18, 1979, the magistrate ruled that she had jurisdiction over the subject matter and the person of the defendant; that the extradition treaty was applicable and was complied with; and that there existed pro-

bable cause to believe that this petitioner committed the acts alleged in the extradition request. The magistrate's detailed memorandum opinion is clearly supported by ample evidence and is hereby adopted by this court and appended hereto. The cause is before this court on petitioner's request for the issuance of a writ of habeas corpus to prevent his extradition.

> [The writ of] habeas corpus cannot take the place of a writ of error. It is not a means for rehearing what the magistrate already has decided. The alleged fugitive from justice has had his hearing and habeas corpus is available only to inquire whether the magistrate had jurisdiction, whether the offense charged is within the treaty and, by somewhat liberal extension, whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty.
>
> Fernandez v. Phillips, 268 U.S. 311, 312 (1925) (citations omitted).

A thorough review of the treaty, the Convention on Extradition Between the Government of the United States of America and the Government of the State

of Israel, 14 U.S.T. 1707, T.I.A.S. No. 5476, the briefs filed with this court, and the record below clearly demonstrate that the treaty was properly invoked and that the magistrate had jurisdiction over the matter. Petitioner's arguments to this court rest primarily on the issue of probable cause.

Petitioner alleges that the magistrate improperly excluded evidence which would impeach or "explain" the statement of petitioner's alleged accomplice in the bombing. The accomplice's statement implicated the petitioner. The excluded evidence went to the weight of the accomplice's statement. As such, it was properly excluded. Collins v. Loisel, 259 U.S. 309 (1922); Shapiro v. Ferrandina, 478 F.2d 894 (2d Cir. 1973), cert. dismissed, 414 U.S. 884 (1973); In re Lincoln, 228 F.2d 70, 71 (E.D.N.Y. 1915); Fernandez v. Phillips, supra.

Petitioner next argues that the alleged offense is of a political character and, pursuant to Article VI of the treaty, is not an extraditable offense. The magistrate, properly admitting probative

evidence on the issue and properly excluding other proferred evidence, and applying appropriate legal standards, found that the alleged offense was not of a political character. The finding is based on competent evidence and is the result of the application of proper legal standards.

For these reasons and those stated in the memorandum opinion of Magistrate Jurco in "In the Matter of the Extradition of Ziyad Abu Eain," etc., 79 M 175, dated December 18, 1979, petitioner's request for the issuance of a writ of habeas corpus is denied.

ENTER:

Frank McGarr

UNITED STATES DISTRICT JUDGE

DATED: March 28, 1980

Attachment - Memorandum of the Honorable Olga Jurco, 'In the Matter of the Extradition of Ziyad Abu Eain; also known as Ziyad Abu Ayin, also known as Tarifi," 79 M 175, Dec. 18, 1979.

IN THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT OF
ILLINOIS EASTERN DIVISION

IN THE MATTER OF THE EXTRADITION

OF

ZIYAD ABU EAIN, also known as
ZIYAD ABU AYIN, also known as
TARIFI.

Magistrate No. 79 M 175

MEMORANDUM

Extradition proceedings were commenced by the United States on behalf of the State of Israel under §3184, 18 U.S.C. and Article X of the Treaty between the United States and Israel which has been in effect since December 5, 1963. Ziyad Abu Eain was arrested on the complaint charges on August 21, 1979 and remains in custody. He is charged to have committed, in Tiberias, Israel, the crimes of murder, punishable by life imprisonment, and causing bodily harm with aggravating intent, punishable by twenty-year imprisonment. Said crimes were allegedly committed by placing an explosive device on May 14, 1979 in a trash bin located on a public street in a market square, which

device exploded and caused the death of two young Jewish males and injured thirty-six other persons.

The extradition hearing commenced September 26, 1979 in order to accomodate availability of witnesses for the government and the accused and was adjourned to later dates for the same purpose. The hearing took seven days. Following the closing of evidence, the parties requested and were granted leave to file post-hearing briefs. Later filed motions have been received directed to receipt of additional evidence and exclusion of certain evidence.

The evidence presented must satisfy these necessary elements: (1) that a crime was committed in Israel, (2) that the offense charged is an offense in the United States, (3) that the person arrested and brought before the Magistrate is the person accused of the commission of that offense, (4) that the evidence establishes reasonable grounds to believe the accused is guilty of the offense, and (5) that the offense is an extraditable offense under the terms of the Treaty.

Under the procedure provided for by §3184 and the Treaty, the government introduced into evidence its Government Exhibits 1 through 42, which were accompanied by the certificate of the principal diplomatic and consular officer resident in Israel. Such certificate is proof that the documents included under that certification, or copies thereof, are authenticated in the manner required by law and the Treaty. The accused has not challenged the adequacy of such certification.

No contention is made that the government's evidence does not establish that the offenses of murder and "malicious wounding, inflicting bodily injuries" were committed in Israel, or that they are offenses covered by the Treaty between the United States and Israel, and that these offenses are recognized as crimes under the laws of Illinois, which if committed here would be the crimes of murder, attempted murder, and aggravated battery. Ill. Rev. Stats., 1977, Ch. 38 §§8-4, 9-1, 12-4.

Evidence was presented to bear upon two important issues: (1) the competency and sufficiency of the evidence to establish probable cause to believe the offenses charged were committed, that the person charged committed these offenses, and that the person arrested and before the court is the person named in the complaint;[1] and (2) whether the charged offenses are political offenses and therefore offenses for which the accused cannot be extradited as provided in Article VI(4)

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1. Article V, Treaty. Extradition shall be granted only if the evidence be found sufficient, according to the laws of the place where the person sought shall be found, either to justify his committal for trial if the offense of which he is accused had been committed in that place or to prove that he is the identical person convicted by the courts of the requesting Party.

Article IX, Treaty. The determination that extradition based upon the request therefor should or should not be granted shall be made in accordance with the domestic law of the requested Party and the person whose extradition is sought shall have the right to use such remedies and recourses as are provided by such law.

of the Treaty between the United States and Israel.

The government called to the witness stand law enforcement officers who arrested Ziyad Abu Eain in Chicago pursuant to the arrest warrant and who took the fingerprints of the arrested person. The government also presented testimony of its fingerprint specialist, Special Agent Thomas Gremmere. Among the certified and authenticated documents were a set of fingerprints identified as those of Ziad Abu Eain and his photograph (Government Exhibit 1, pp. 21-22, p. 16), Agent Howe testified that following his arrest and fingerprinting on August 21, 1979, he asked Ziad Abu Eain about the name Tarifi and was told that "that is what they call me" (Tr. 25-27). The statements of Jamal Hassan Yasin and of Mufida J. Khalil Jaber (Govt. Ex. 1, pp. 7-13) refer to the name Tarifi and identify the picture of Ziad Abu Eain as the person with whom each had spoken. His brother-in-law testified that nicknames are often applied on the basis of an ancestor's home town (Yusuf, Tr. 1400-3). The

accused argued that his arrest in Chicago was illegal and without due process and his fingerprints taken "under a coercive situation" (Tr. 46) following his arrest cannot be used because he neither speaks nor understands English; that Govt. Exs. 5 and 6 were procured through violation of his constitutional rights guaranteed by American law and cannot serve as a comparison basis with the fingerprints received from Israel. He also states that the fingerprint evidence from Israel establishes only identity and there is no evidence as to when, where and why the Israeli card was executed or evidence of any fingerprints taken in connection with the events upon which the charges are based.

I am satisfied that the accused understood he was arrested on a warrant requested by State of Israel, and identified his fingerprints by his own signature with understanding that he was identifying his own fingerprints. The circumstances surrounding the arrest and fingerprinting are disclosed in the record, and I further find that his arrest and fingerprinting

process was in accordance with the law of the United States; that his arrest was lawful. Neither the arrest nor the fingerprint process violated rights guaranteed under the laws of the United States or State of Illinois. The Israeli fingerprints were offered to show that the person arrested is the person named in the sworn complaint, and their source or connection to the charged offense is not required to show they belong to the same person. I find that the person arrested, Ziyad Abu Eain, is the person named and charged in the sworn complaint and is the person whose extradition is requested by the State of Israel.

The evidence received from Israel and produced by the United States on its behalf satisfies the Treaty requirements and statutes and is therefore competent evidence.[2] The question is whether

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2. Exhibit 1 consists of 34 pages as follows: Statement of Jamal Hassan Yasin (pp. 7-13), Statement of Mufida Khalil Jaber (pp. 14-20), Israel fingerprints (pp. 21-22), Statement of Police Capt. Peretz (pp. 23-26), Notification of Death of Boaz Lahav and David Lancri (pp. 27-30), Israel arrest warrant for Abu Eain (pp. 31-32), Statement of

such evidence is sufficient to show reasonable grounds to believe the accused committed the offenses charged.

The Statement of Yasin is the principal document which implicates the accused in the events of May 14, 1979. In substance, Yasin avers that he and accused, Ziyad Tarifi, knew each other and "we are pals;" that on May 11, 1979 they went to Tiberias where for three hours they walked around its market area and main streets; they talked politics and Yasin enlisted the accused in Fatah; that Yasin wished to carry out an attack in Tiberias on May 14; that on May 14 Yasin prepared an explosive charge in his home and met the accused, asking whether they should carry out the attack in Tiberias today; that the accused was willing to do so and Yasin instructed him on how to set the clock and wires in the explosive charge; that thereafter

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Proceedings on 8/24/79 by Magistrate Shabtay (pp. 33-34). Exhibits 2 and 3 --Ex. 2 is a copy of Ex. 3 showing site of explosion; Exhibits 4 and 4a--the Extradition Treaty between United States and Israel.

Ziyad Tarifi asked to go alone to Tiberias to carry out the attack; Yasin gave the accused the explosive charge, told him to put the charge in a refuse bin in Tiberias, it did not matter what refuse bin, and not to go near an army vehicle so that he or the car might not be suspected; that because of an arrest made, he told accused they were in danger, not to do anything until Yasin contacted him; that Yasin gave a letter to his cousin Mufida Jaber to deliver to the accused; she told him it was delivered and that the accused had gone to America. The statement declares that it was read to Yasin and that he certified its correctness by his signature.

By letter of November 21st, responded to by the government November 27th, the accused has called attention to the English translation of that statement, and that the translator's certificate is dated August 15, 1979 "approximately five (5) weeks before the purported confession was tendered." As the government reply states, by this obvious contradiction of date, the accused seeks to cast doubt on the authenticity and

veracity of the entire Statement of Yasin. It is an admitted mistake by the English translator. However, such inconsistency and discrepancy is of no consequence if there exists in those documents any other competent evidence. The Hebrew statement itself (Ex. 1, p. 9) bears the legible date of 23-7-79 above numbered line 1, and the reaffirming affidavit of Yasin (Ex. 1, p. 8) attests to the making of the statement on July 23, 1979. The letter from the accused also asserts that neither the Statement of Yasin nor the Statement of Jaber carry translations from Hebrew, the language in which they were written, into Arabic and vice-versa, to assure understanding by the affiants. Government Ex. 1, p. 34, relating to reaffirming statements of Yasin and Jaber of their prior statements is a summary of proceedings before Magistrate Shabtay wherein he avers that he "conversed with them in Arabic" and that both understood the contents of their statements. In addition, each statement - that of Yasin of July 23, 1979 and that of Jaber of July 4, 1979 - recite it was read to them and they certified the correctness by their signature.

The accused contends the evidence in support of a finding of probable cause is not sufficient in that (1) the Statement of Jamal Hassan Yasin is that of an accomplice and therefore must, under Illinois law, be received and acted upon with caution; (2) the Statement of Yasin is a self-serving declaration and no other corroborative evidence connecting the accused to the offense has been presented and further this in-custody, self-serving declaration may have been made under duress, or for reward, or relief from interrogation; (3) the Statement of Yasin and its contents have not been buttressed by other corroborative evidence; (4) the Statement of Yasin does meet the minimum requirements as evidence of probable cause under the laws of the United States and State of Illinois because the Hebrew statement is not shown to have been understood by Yasin and not shown to have been made freely and voluntarily; (5) the Statement of Yasin was twice recanted by him, further demonstrating its unreliability; and (6) the Statement of Jaber contains no details pertaining to the alleged bombing to show probable cause, and further does not establish "flight" of the accused.

Each of these contentions is directed to the evidentiary or qualitative sufficiency of the statements. The parameters of probable cause hearing are not to determine guilt or innocence; an extradition hearing is not a trial. The sworn statement of a co-defendant or accomplice must be considered together with all other facts adduced at the hearing.

Corroborative evidence of facts is found in the Statement of Jaber. She states she received a note from her cousin, Yasin, which note advised Ziyad that others had been caught and to be careful; that Ziyad asked her where Jamal was and she stated she did not know; that Ziyad said he wished to go to America that day; that she conveyed the message to her cousin that Ziyad wanted to go to America. Government Exhibits 1 through 3 show that an explosion, from an explosive device, occurred in the market area on a main street in Tiberias, Israel on the afternoon of May 14, 1979 at approximately the time for which the device was set. These are corroborative evidence that Yasin and the accused knew each other, that Yasin warned the accused to be careful because others had been arrested, that in Tiberias

on May 14, 1979 an explosion occurred at the approximate time the device was set.

The suspected "voluntariness" of the Yasin statement, because of the "usual" manner by which these are given and the "recanting" thereof by Yasin were sought to be introduced by the accused. That effort was refused because I may only receive evidence offered by the accused that explains or clarifies the demanding country's proof. The accused does not have the right to contradict the demanding country's proof or pose questions of credibility. Collins v. Loisel, 259 U.S.309 (1922); Shapiro v. Ferrandino, 478 F.2d 894 (2nd Cir. 1973).

The accused filed a Motion to Reconsider and Admit Proof contained in his Exhibits 25 through 42, previously refused admission into evidence during the extradition hearing. It is contended that these documents support the truthfulness of Yasin's retracting statements that Ziyad Abu Eain was not involved in the events of May 14, 1979 and also to show the physical circumstances and background facts surrounding May 14, 1979. These sworn documents

attest to an averred presence of the accused in Ramallah, not in Tiberias, on May 14, 1979 due to the birth of a nephew. Defendant's Exhibits 25 through 38 are also offered to substantiate a later Yasin retraction of his prior statement of July 23, 1979 to show inferentially the quality of the self-styled confession of Yasin. The Motion to Admit Exhibits 25 through 42 is denied: first, because the exhibits inextricably involve the defense of alibi which cannot be adjudged by this court, and second, because they require as a preface the admission in this hearing of Yasin's retraction of his July 23, 1979 statement. (Defendant requests on adverse ruling on Motions to Admit Proof of Exs. 23 through 42 his motion and exhibits be treated as offers of Proof; his motion is denied and the same are added as Offers of Proof.)

The Supreme Court of the United States in Charlton v. Kelly, 229 U.S. 447, 461 (1913), quoting In re Wadge, 15 Fed. 864, 866, has stated that to allow such evidence for the accused in defense:

> "...would give him the option of insisting upon a full hearing and trial of his case here; and that might compel the demanding government to produce all its evidence here, both direct and rebutting, in order to meet the defense thus gathered from every quarter. The result would be that the foreign government, though entitled by the terms of the treaty to the extradition of the accused for the purpose of a trial where the crime was committed, would be compelled to go into a full trial on the merits in a foreign country, under all the disadvantages of such a situation, and could not obtain extradition until after it had procured a conviction of the accused upon a full and substantial trial here. This would be in plain contravention of the intent and meaning of the extradition treaties."

Shapiro v. Ferrandino, 478 F.2d 894, 905 (2nd Cir. 1973).

The accused has requested reconsideration of previous denial of his Exhibits 23, 24 and 25 to show that the government of Israel is acting in bad faith, that extradition is sought for the offense of membership in a political organization - a crime not included in the extradition treaty and in violation of Article XIII thereof, and that such crimes

are tried by military tribunals and not civil courts. These were refused admission because of immateriality to the charged offense and further for lack of authenticity of document source. The government, during the hearing, advised that formal charges by the State of Israel were enroute through diplomatic channels. At a date subsequent to the hearing, Government Exhibit 37 was received into evidence to assure the accused that the charges against him were the charges in the sworn complaint and that the same were to be tried in the civil courts of Israel.

From a review of the testimony and all evidence received, and all reasonable inferences to be drawn therefrom, the finding is made that there is evidence furnishing probable cause to believe that, as charged in the sworn complaint for extradition, the crimes of murder and causing bodily harm with aggravating intent, were committed in Tiberias, Israel by the accused Ziyad Abu Eain, whose identity has been established as being the same person who is named in the extra-

dition complaint. The offenses are crimes in the State of Illinois and are offenses included in the Treaty as extraditable.

There remains the important issue of applicability and interpretation to be given to Article VI(4) of the Treaty and its effect on the finding of probable cause to believe accused committed the offenses charged. The Treaty provides:

> "Extradition shall not be granted in any of the following circumstances: ..."(4) When the offense is regarded by the requested party as one of a political character or if the person sought proves that the request for extradition has, in fact, been made with a view of trying or punishing him for an offense of political character."

On this issue, the parties have presented additional requests following the post-trial briefing with regard to admission or exclusion of evidence. (1) The government seeks the admission of the Minority Report of the National Lawyers Guild on Treatment of Palestinians in Israeli Occupied Territories as Government Exhibit 38 as a necessary part of Defendant's Offer of Proof, Exhibit 4, which is the Majority Report of the National Lawyers Guild, offered and refused admission

during the testimony of William Montross. The government's motion is denied for the reason that the Majority Report was refused admission into evidence. (2) The defendant's motion for leave to file Exhibit 43 into evidence, being the 1979 United Nations Security Council meetings of January 19, March 13, 19 and 22, and June 29 is denied. The tender is made long after the closing of evidence. (3) The defendant's motion to exclude the testimony of government witness Louis Fields is denied. All of the reasons stated in support of that motion were a part of the discussions and considerations held during the hearing of October 10, 1979.

On September 27th and during the extended hearing, the accused requested that judicial notice be taken "that there is now, and has existed for more than three decades, a military and political conflict between the Government of the State of Israel and the several Arab states and the People of Palestine." Judicial notice was refused because that doctrine includes admission only of those matters generally known within the territorial jurisdiction of the trial court, or capable of accurate and ready determination by resort to

sources whose accuracy cannot reasonably be questioned (Cf Ev. Rule 201(b)).

The accused presented evidence to show that the offenses, if committed by him, are offenses which are "political in character." Evidence was received which sought to explain and clarify the nature of the conflict in the Middle East before, during and after the 1948 proclamation of a State of Israel (formerly called Palestine) and the Arab population which resided there, as well as the 1967 occupation by Israel of the West Bank in the country of Jordan, including the Arab sector of the City of Jerusalem.[3]

A relative political offense is one, which standing alone, is a common crime, but if it is connected with a civil war or other similar disturbance it becomes a

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3. Palestine had been under British mandate from 1920 to 1948. In 1947 the United Nations adopted a Palestine Partition Plan which divided Palestine into an Israel and Arab State of Palestine. Armed conflict ensued between the State of Israel and the surrounding Arab countries.

political offense for purpose of avoiding extradition. (Mallison, Tr. 819; Fields Tr. 1041, 1071). The accused's evidence is directed to show that these offenses, if committed by the accused, come within the category of political offenses. Professor Mallison also described a political offense as an offense committed for the purpose of changing the governmental structure (Tr. 820). It was his opinion that there was and is a state of war since 1948 in Israel or that there exists an insurrection in Israel (Tr. 779-780, 822-823); that the conflict in the Middle East is a political and military conflict (Tr. 735) and that the purpose of the P.L.O. is to alter the governmental structure in Israel and Palestine (Tr. 805). He also testified that non-combatants have a different relationship to enemy power and that direct attacks on civilians are unlawful notwithstanding the perpetrator's identity (Tr. 835, 832-36, 863-64, 867).

The testimony of Mayor Qawasmeh of Hebron, Jordan, and that of Ms. Johnson, former State Department vice-consul in the City of Jerusalem, described the manner

and condition of Arab life in the occupied West Bank of Jordan. It was elicited from these witnesses that the occupied West Bank is governed through Israeli military governors (Qawasmeh, Tr. 286); that there is freedom of election exercised by West Bank Arabs in local self-government and no Israeli votes in such election (Qawasmeh, Tr. 435); that there are civil courts with Arab judges (Qawasmeh, Tr. 451-452); that Jordanian law is applied in the West Bank Qawasmeh, Tr. 319); that freedom of movement is generally permitted (Qawasmeh, Tr. 438, 461) but there are also restrictions and in certain areas person and property are subject to search (Johnson, Tr. 514-516, 552-4); that membership in certain organizations is subject to arrest and punishment in Israeli military tribunals (Johnson, Tr. 527-8; Qawasmeh, Tr. 323, 327); that expropriation of land and seizure of property occurs for commission of certain acts and crimes (Qawasmeh, Tr. 373, 413, 447-9); that there is resistance to Israeli occupation of the West Bank; that the P.L.O. is the representative for the Arabs (Qawasmeh, Tr. 426-8, 432). The evidence also showed that the demography of Israel and the West Bank of Jordan

has altered considerably in that there has been a great increase in the area of the Jewish population (Rabbi Berger, Tr. 630-3); that this is due to dedication to Zionist principles in the creation of Israel establishing national rights for Jews (Berger, Tr. 604-5, 608-9); that the Palestinian Arabs do not consider they are citizens of the country of Jordan and do not want citizenship there (Berger, Tr. 697; Qawasmeh, Tr. 430-431).

Counsel for accused states the political program of Fatah is directed to "creating a 'democratic non-sectarian state' in place of the present State of Israel; and resisting Israeli occupation of Palestinian land." (Dft. Brf. p. 27; Berger Tr. 672-3). The accused emphasizes that the P.L.O. has received recognition as the legitimate representative for the Palestinian-Arabs in the United Nations, is an official observer in that body and has been recognized by other organizations and countries (Tr. 608). He calls attention to the concern of the world community of nations through the Geneva Convention and the United Nations resolutions for adherence to humanitarian considerations to be given by Israel to Palestinian-Arab

refugees in the occupied West Bank of Jordan. Exhibits have been received in evidence dealing with such concern.

The government regards all of the accused's evidence to be irrelevant. It urges that because the offenses involved the death and injury of innocent victims, it is an act of terrorism, and further, under any theory of "offense of political character," parties who are the target victims must be considered. (Fields, Tr. 1041; Govt. Ex. 10; Mallison, Tr. 833, 867, 869-70). The accused sought discovery as to the status of those who were killed and injured; it was denied. It was the testimony of Louis Fields, appearing as the authorized spokesman for the Department of State, and who is Legal Adviser for the Department of State, that the offenses described in Government Exhibits 1 through 3 are viewed by the Department of State as common crimes and not offenses of political character, because "it was indiscriminate use of violence against civilian populations, innocent parties" (Tr. 1038, 1041, 1053).

In evaluating the nature of the offenses, various scholars on the subject of political offenses have delineated

certain tests to assist in the determination. Among these are the following: (1) the offender's past participation and involvement with a political movement and his personal beliefs as tied to a political motive; (2) existence of a connection or link between the crime and political objective; (3) relation or proportion between the crime and its method of commission and the political objective.[4]

The accused refers to the Statement of Yasin to show his political motivation in that they talked politics and he agreed to enlist in the Fatah organization. There next must be shown a connection between the crime and the political objective of Fatah and the P.L.O. The statement of Yasin shows he wished to carry out an attack on May 14, that the date was a Monday, not a Tuesday, as he had thought;

---

4. Cantrell, The Political Offense Exception in International Extradition, 60 Marquette Law Journal 777 (1977); Garcia-Mora, the Nature of Political Offenses, 48 Virginia Law Review 1226 (1962); Green, Political Offenses, War Crimes and Extradition, 11 International and Comparative Law Quarterly, 329 (1962).

that the attack was to put "the explosive charge in a refuse bin in Tiberias; it did not matter what refuse bin," that he admonished the accused not to go near an army vehicle. The target is not otherwise described. The statement of Peretz (Ex. 1, pp. 23-6) states that May 14 was the eve of Lag Be'omer (a religious festival) and there was a rally of youth in Tiberias. Rabbi Berger testified that May 15 is the day usually recognized as a holiday because of the establishment of the State of Israel, but could not state whether it occurred on May 15, this year (1979) because the State of Israel runs on a lunar calendar (Tr. 674, 675, 704). Government's evidence shows that on May 14, two young Jewish males were killed and thirty-six other persons were injured and hospitalized; that Tiberias is a sea resort town located on the Sea of Galilee, which had been a part of the State of Israel since 1948; Government Exhibits 2 and 3 show the explosive was placed in a public place, near a bus stop on Galil Street in the market square in Tiberias, Israel. The accused seeks shelter in the history and evidence of Israeli-Arab conflict and in the existence of the P.L.O. as his political

motivation to kill and injure; in other words, he seeks to equate the actions of violence as political because he is a member of an organization which acts for and on behalf of the P.L.O. Counsel for accused urges that evidence of the conflict and turbulence between Israel and the Palestinian-Arabs, the existence of the P.L.O. as the central representative for the Palestinian-Arabs, and the tactics of the P.L.O. in achieving its political objective, "tend" to show his alleged offenses were political offenses; that the burden now shifts to the government to show otherwise and it has failed to show that innocent civilians were killed and injured. That argument overlooks a significant issue--that it is the accused whose acts are subject to scrutiny; he must show the link between the crimes he allegedly committed and their relation to the political objective. Exemption of relative political crimes exists only where such crimes are directed against the political organization of the State. The achievement of that political objective has not been linked to the means used and

the target involved. The evidence shows a random selection of the locale; a locale where a Youth Rally and religious festival was being held in Tiberias, Israel. Defendant's argument seeks to lead to a conclusion that every Israeli present in Tiberias is in the military service of his country and therefore cannot be regarded as a civilian; that a violent act by a Palestinian-Arab against an Israeli comes within the political offense exception.

Accepting that defendant was a member of a P.L.O. organization and with motivation toward its political objective, there is nothing in the evidence which "tends" to show that this act was directed in opposition to the State of Israel and that the crime furthered the cause of his group objective. He has not shown the relation between these crimes, the method of their commission and the political objective. The random and indiscriminate placing of an explosive near a bus stop on a public street in any trash bin defuses any theory that the target was a military one or justified by any military necessity. It was an isolated act of violence. The commission of these alleged offenses is

so remote from the political objective that it could not reasonably have been believed by the offender to have a direct political effect on the government of Israel; nor was it directed at the government of Israel.

The accused has failed to present evidence establishing, or even tending to establish, that the nature and the circumstances of the commission of the common crimes of murder and causing bodily injury with aggravating intent are such as to make such crimes as offenses of a political character.

For all of the above and foregoing reasons, I find probable cause exists to believe the accused committed the charged offenses and find further that the nature and circumstances of their commission are not within the exception from extradition as an offense political in character.

_____

Olga Jurco
United States Magistrate

December 18, 1979

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Statement by Yasin Jamal
Surname Given Name

Father's Name: Hasan
Identity No. 9864410
Place of Birth: Jalzun Year of Birth: 1957
Permanent Address: Al-Bireh, Ramallah
Occupation: Teacher
Date: 23/9/79 Time: 08:54
Place: Minorities Section
Name and Rank of Examiner: First Sergeant
Shmuel Zaken

I saw Jamal Hasan Ahmad Yasin before me and said to him: I, a police officer, First Sergeant Shmuel Zaken, warn you that you are not required to add anything to the testimony you gave at the Police-station unless you want to but that everything you say will be written down by me and may be used as evidence in court.

JAMAL HASAN AHMAD YASIN

After I had read the warning to the above-named and he had understood it, he said: I wish to tell you several things of my own free will. On May 11, 1979 - it was on a Friday - I wished to travel to Tiberias for

reconnaisance prior to laying an explosive charge there. I left home at 07:30 hours and drove to Manara Square in my Volkswagen. In Manara Square I met with a lad named Ziyad Tarifi, whom I know to be the owner of a shop - he and his father - in the market. I and Ziyad know each other and we are pals. I met with Ziyad Tarifi in Manara Square and asked him what he thought about coming for a trip with me to Tiberias, and he said he was willing to come but wished to drive the car. I agreed and we, I and Ziyad Tarifi, drove off. On the way to Tiberias we, I and Ziyad Tarifi, talked politics. When we arrived in Tiberias, we parked the car, and went down the streets of Tiberias on foot: to the market, to the main streets; thus we walked about Tiberias for three hours. Then we returned to the car and started back on our way to Ramallah. En route, I talked to Ziyad Tarifi. I told him that I was enlisted in the Fatah organization, and asked him whether he was willing to enlist in the Fatah with me, and he agreed to enlist in the Fatah organization. He also told me he wanted us to carry out attacks and not just sit around. I said to Ziyad: You have nothing to worry about. After I

have enlisted you, I shall train and teach you, and then you will be able to carry out attacks with me. I wish to carry out the attack in Tiberias on May 14, 1979, which I thought was a Tuesday. I thought so, but on Monday I realized that this was the 14th. On that day, Monday, in the morning, I prepared an explosive charge. I took it and put it on the table in my room. I left the house and went to Ramallah, in the direction of the bus station, in order to meet with Nadia to tell her that May 14, 1979, was today, Monday, not Tuesday, as we had thought previously. When I met Nadia, I told her this and post-poned the operation. I travelled in my car to Manara Square and there met with Ziyad Tarifi and said to him: What do you think? Shall we, you and I, go and carry out an attack in Tiberias today? And Ziyad Tarifi said to me: I am willing to go with you and carry out an attack in Tiberias. We, I and Ziyad Tarifi drove off. We went to my room in my house at Al-Birah. We, I and Ziyad, sat in my room, and I explained to him how to set the clock and the wires in the explosives charge. After Ziyad Tarifi understood how to set the clock

and the wires, he said to me: I want to tell you something. And Ziyad Tarifi asked me to let him go alone to Tiberias and carry out the attack there because I would be suspected whereas he, Ziyad, would not be suspected; there were many people who knew me, and he did not wish us to be seen together. I explained to Ziyad that it was advisable that I should go with him and that we should carry out the attack together, but Ziyad Tarifi did not agree and asked to go to Tiberias alone. I gave him the explosives charge which I had prepared that day. The charge was in a nylon bag, and I told Ziyad Tarifi to put the charge in a refuse bin in Tiberias; it did not matter what refuse bin, only that the charge should not be discovered and he, Ziyad, should not be caught. I explained to Ziyad Tarifi that when he arrived in Afula he should see what time it was in order to check how long it was from Afula to Tiberias so that he might be able to set the clock of the charge in such a way that he would have reached Afula by the time the charge went off. I told Ziyad Tarifi not to go near an army vehicle so that he or the

car might not be suspected, and Ziyad agreed to what I said. He then took the explosive charge and left my house. It was 09:00 hours. I gave Ziyad L1,000 to use en route in case he lacked money. Ziyad took the explosive charge, sat in the Wolkswagen and drove off. At approximately 16:30 hours, Ziyad Tarifi returned with my car and told me that he had put the charge in a refuse bin in the center of the town and that everything was all right; he had set the clock for about 13:30 hours. Ziyad stayed with me for about 15 minutes. I took him to his house, next to the Military government, and returned home at 17:30 hours. I heard on Israel Radio in Arabic, that an explosive charge had gone off in Tiberias, that 2 persons had been killed and 36 injured. The next day I met Ziyad and told him that the charge had gone off and that the operation had succeeded, that two people had been killed and 36 injured. Ziyad told me that he had heard it on the radio. I then gave him a code name, Abu Yusra, after my comrade, Abd-el-Rahman Hasan Abd-el-Rahman, who had been killed at Tirat Tsvi, with a squad which had infiltrated across the border. I named the Tiberias attack after my comrade al-Rahman. I told Ziyad Tifari to be cautious and take care of himself until I

contacted him. Ziyad told me that he had put the charge in the center of the market in Tiberias, on the main street. Thereafter I met Ziyad at my house one or two more times. On the day Ataf was arrested, I told Ziyad Tarifi that we were in danger (khatar) and that he should do nothing until I contacted him. Two days later, I sent him a letter which my cousin, Mufida Jaber, took to him. I wrote asking him to go to Syria, to Abu Ziyad's office, where he was to report what had happened, and he was to deliver a letter to Abu Ziyad. Mufida informed me Ziyad had gone to America via Amman. These are the dealings I had with Ziyad Tarifi. This is Jamal Yasin's statement which has been read to him and which he has certified as correct by his signature.

JAMAL HASAN AHMAD YASIN

I the undersigned, Dr. Menahem Walter Eichelberg, Senior Translator at the Ministry of Justice, hereby declare that I am well acquainted with the Hebrew and English languages and that the above is a true translation, prepared by me, of the Hebrew original.

Dr. Menahem Walter Eichelberg

Jerusalem, August 15, 1979

TRANSLATION FROM THE HEBREW

SWORN STATEMENT

I, Jamal Hasan Yasin, after swearing to speak the truth, hereby declare on oath as follows:

1. On July 23, 1979, at 08:50 hours, at the Minorities Section, Israel Police, I made to First Sergeant Shmuel Zaken a statement concerning the laying of an explosive charge in Tiberias by Ziyad Abu Eain Tarifi on May 14, 1979. A copy of the statement is attached hereto, marked "J.H.Y. (1)".

2. Everything contained in the statement I made to First Sergeant Zaken is true and I certify the correctness of its contents.

3. The picture attached hereto, marked "J.H.Y. (2)", is a picture of Ziyad Abu Eain Tarifi.

JAMAL HASAN YASIN

Jamal Hasan Yasin

I, Y. Shabtay, Judge of the Magistrates' Court of Jerusalem, hereby certify that on August 24, 1979 there appeared before me Jamal Hasan Yasin and, after swearing to speak the truth, made before me the above statement on oath and signed it.

Y. SHABTAY

Judge

Rubber stamp: Magistrates' Court of Jerusalem

I the undersigned, Dr. Menahem Walter Eichelberg, Senior Translator at the Ministry of Justice, hereby declare that I am well acquainted with the Hebrew and English languages and that the above is a true translation, prepared by me, of the Hebrew original.

Dr. Menahem Walter Eichelberg

Jerusalem, August 24, 1979

Statement by Jaber Mufida
Surname Given Name
Year of Birth: 1957 Father's Name: Kahlil Identity No. 9864408
Place of Birth: Ramallah
Permanent Address: Jalzun
Occupation: Secretary
Place of Employment: Bet-El, Ramallah

Date 4/7/79 Time: 09:50
Place: Minorities Section
Rank and Name of Examiner: First Sergeant Shmuel Zaken

I saw Mufida Khalil Hasan Jaber before me and said to her: I, a police officer, First Sergeant Shmuel Zaken, warn you that you are not required to add anything to the testimony you gave at the police-station unless you want to but that everything you say will be written down by me and may be used as evidence in court.

MUFIDA KHALIL HASAN JABER

After I had read the warning to the above-named and she had understood it, she said: I wish to tell you, of my own free will, several things I did not tell before in my testimony. Four days after Jamal Yasin became wanted, there came to my Uncle Kamal's house a lad of twenty-five whom I do not know. He asked me whether I was Mufida. I said I was, and he gave me a little note with some writing on it and said, "Good morning, give the letter to a lad named Ziyad Tarifi". On the note was written "To Ziyad, Talila, Jan and Umm Anmar have been caught. Be careful." I took the note from the lad and went to Manara Square, to Tarifi's shop. I saw Ziyad and gave him the note. Ziyad then asked me: "Where is Jamal?" I told him that I did not know. Ziyad then told me that he wished to go to America that day. About four days later, near the Ramallah bus station, I met the lad who had come to the house. I told him to tell Jamal that Ziyad Tarifi wished to go to America.

The lad then gave me a letter (risala) which I was to deliver to Ziyad Tarifi. I do not know what was written in the letter. The first time I saw Ziyad Tarifi, he told me that he wished to go to America via Amman. The next day, I went to Ziyad Tarifi's shop, gave him the letter and returned home. The day before I delivered the letter to Ziyad Tarifi, I met with the young lad near the bus station, as the lad had arranged with me. I was to give him a reply as to whether I would go to Syria to deliver a letter at the office of Abu Ziyad. I told him that I could not go. I told him that Ziyad Tarifi wished to go to Amman. The lad then gave me the letter and told me that I was not to go to Syria, to Abu Ziyad. The first or second time that I travelled to Amman and from there to Syria, to the office of Abu Ziyad, I had been sent there by Jamal to get money from Abu Ziyad in order that Jamal might buy a car. When I arrived at Abu Ziyad's office in Syria, I told him about the money for Jamal. Abu Ziyad then asked me about a cache at the cemetery and whether I did not

know where the cache had been. I told Abu Ziyad that Jamal had told me that there had been no explosives at that cache. Abu Ziyad said nothing. The third time I went to see Abu Ziyad in Syria he gave me 160 Jordanian dinars which I was to deliver to Jamal. He told me to tell Jamal that there was no money for the car. When I returned to Ramallah, I gave Jamal the money. I do not remember whether I told him what Abu Ziyad had said to me. This is what I had to tell you. This is Mufida Jaber's Statement which has been read to her and which she has certified as correct by her signature.

MUFIDA KHALIL HASAN JABER

I the undersigned, Dr. Menahem Walter Eichelberg, Senior Translator at the Ministry of Justice, hereby declare that I am well acquainted with the Hebrew and English languages and that the above is a true translation, prepared by me, of the Hebrew original.

Dr. Menahem Walter Eichelberg
Jerusalem, August 15, 1979

TRANSLATION FROM THE HEBREW

SWORN STATEMENT

I, Mufida Khalil Jaber, after swearing to speak the truth, hereby declare on oath as follows:

1. On July 4, 1979, at 09:30 hours, at the Minorities Section, Israel Police, I made to First Sergeant Shmuel Zaken a statement concerning the delivery of a letter by me to Ziyad Abu Eain Tarifi. A copy of the statement is attached hereto, marked "M.Kh.J.(1)".

2. Everything contained in the statement I made to First Sergeant Zaken is true and I certify the correctness of the contents.

3. The picture attached hereto, marked "M.kh.J. (2)", is a picture of Ziyad Abu Eain Tarifi.

MUFIDA KHALIL JABER

Mufida Khalil Jaber

I, Y. Shabtay, Judge of the Magistrates' Court of Jerusalem, hereby certify that

on August 24, 1979 there appeared before me Mufida Khalil Jaber and, after swearing to speak the truth, made before me the above statement on oath and signed it.

Y. Shabtay

Judge

Rubber stamp: Magistrates' Court of Jerusalem

I the undersigned, Dr. Menahem Walter Eichelberg, Senior Translator at the Ministry of Justice, hereby declare that I am well acquainted with the Hebrew and English languages and that the above is a true translation, prepared by me, of the Hebrew original.

Dr. Menahem Walter Eichelberg

Jerusalem, August 24, 1979

DECLARATION UNDER OATH

I, the undersigned, JAMAL YASIN, after I was warned that I have to tell the truth, and if I don't I will be subject to legal punishment, hereby declare the following:

1. My name is JAMAL HASAN YASIN, residing at El-Halazon Refugee Camp.

2. I declare that what I have said against ZIAD MOHAMMAD ABU EAIN and what I said in my affidavit is not true; also what I said in the personnel report that I gave to the police is not true.

3. If it happened that I had declared in front of any judge about the above mentioned ZIAD is true, I hereby declare that all I said in front of any judge at any time anywhere about ZIAD ABU EAIN are untrue statements.

4. I indicated in my affidavit to the police that ZIAD is a member of an illegal organization and his participation in executing a military operation, these things I attributed to ZIAD are not true.

5. I had attributed all of the above to ZIAD because I was sure that he was outside the country, and that it was impossible to arrest him or cause him any harm due to my earlier statements against

him.

6. I make this declaration to be used before any judicial authority, or otherwise, here or abroad or in the United States.

7. I am prepared to give an additional sworn statement before the police or the intelligence service.

8. I declare that I am the above named, and that the signature below is mine, and that all the contents of this declaration are mine and true.

Signature _____

JAMAL HASAN AHMAD YASIN

On 9-26-79, Mr. JAMAL YASIN appeared in front of us, attorneys Ibrahaim Nassar and Lea Tsemel, in Ramlah Prison; the prison guard of Ramlah brought him to us. Mr. JAMAL YASIN gave the above declaration in front of us, declared that all its contents are true, and signed it in front of us, after we warned him to state the truth, and that he would be subject to legal punishment if he does not.

Signature_____ Signature_____

Attorney Attorney

Ibrahim Nassar Lea Tsemel

DECLARATION UNDER OATH

I, the undersigned Mufeedeh Khalil Ghaber Carry I.D. NO. 98644081 Ramallah, from the refugees of Al-Jalazone, born in 1952, after I was told to tell the truth and that I'll be punished by law if I don't say it declare the following:

1. That I was arrested and was interrogated by the Israeli Police, and there I signed two testimonies written in Hebrew, and I can't read Hebrew, and I signed one on 7/6/79 and the other on 4/7/79.

2. When my attorney Leah Izemel translated those two testimonies, I knew that there are things that are not true in it which is:

1. That I was a member of the PLO, which is not true.

2. That a blond tall young man gave me a letter from Jamal and asked me to give it to Ziad Al-Tariefi and to tell him be cautious and they also wrote in my testimony that I went to Ziad and gave him the letter and that I went back to the same blond young man and told him that he will travel to America, and that I took to him another letter, and that is not true.

3. And it is not true holding or knowing any kind of weapons or explosives.

3. I give this declaration so that I stop any harm that may occur to Ziad Al-Tariefi, and may use my declaration and present it to the United States of America and Israeli authorities and all what concerns his extradition to Israel and I said that I knew Ziad because that is how I understood from Jamal that he wanted to know.

4. I declare that the above name is my name and that the undersignature is my signature and the contents of my declaration is true.

_____

Signature

Mufeedeh Khalil Ghaber

Today 2/10/1979 in the Ramla prison Nevy Tatsia, the prison authorities presented to me the prisoner Mufeedeh Khalil Ghaber and after I warned her that she has to tell the truth, and that she will be lawfully punished if she did not do that, she confirmed and signed the truth full of the contents of the above declaration.

_____

Signature of the Attorney

Leah Izemel

TRANSLATOR'S AFFIDAVIT

City of Jerusalem)
Consulate General of the)ss:
United States of America)

Before me Conrad M. Drescher, Vice Consul of the United States of America at Jerusalem, duly commissioned and qualified, personally appeared Hamed Abdelhafeth who, being duly sworn, deposes and says as follows:

I hereby certify that I am an experienced and competent translator of the Arabic and English languages, and that the annexed translation prepared by me is a full and correct translation of the original/certified copy of the original document also annexed hereto.

_____

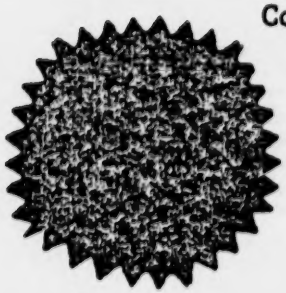
Signature of Translator

Subscribed and sworn to before me this

October 18, 1979

_____

Conrad M. Drescher
Consul of the United States
of America



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CLERK

No. 81-93

In the Supreme Court of the United States

OCTOBER TERM, 1980

ZIAD ABU EAIN, PETITIONER

v.

PETER WILKES, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF ILLINOIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the evidence at petitioner's extradition hearing was sufficient to support the magistrate's determination of probable cause.

2. Whether the court of appeals correctly upheld the magistrate's finding that petitioner is subject to extradition, notwithstanding his contention that the bombing of Israeli civilians by a member of the Palestine Liberation Organization—the crime with which he is charged—falls within the political offense exception in extradition law.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 81-93

ZIAD ABU EAIN, PETITIONER

v.

PETER WILKES, UNITED STATES MARSHAL FOR THE NORTHERN DISTRICT OF ILLINOIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-34) is reported at 641 F. 2d 504. The opinions of the district court (Pet. App. 35a-38a) and the magistrate (Pet. App. 39a-67a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1981. A petition for rehearing was denied on April 13, 1981, and the petition for a writ of certiorari was filed on July 10, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The State of Israel has requested petitioner's extradition on charges of murder, attempted murder, and causing bodily harm with aggravating intent. Pursuant to Israel's request, petitioner was arrested in Chicago, Illinois, on

August 21, 1979. Following an extradition hearing before a magistrate in the United States District Court for the Northern District of Illinois, petitioner was determined to be subject to extradition for the named offenses (Pet. App. 39a-67a). Petitioner thereafter filed a petition for a writ of habeas corpus seeking to prevent his extradition. The petition was denied (Pet. App. 35a-38a), and the court of appeals affirmed (Pet. App. 1-34).

1. In 1963 the United States and Israel approved a bilateral extradition treaty providing for the extradition of persons charged with certain offenses, including murder and the infliction of grievous bodily harm. United States—Israel Convention on Extradition, Dec. 5, 1963, 14 U.S.T. 1707, T.I.A.S. No. 5476. Article V of the treaty provides that extradition shall be granted only if the asylum nation finds that the evidence would be sufficient to hold the accused for trial had the charged offense been committed in the asylum nation. Article VI exempts from extradition persons charged with an offense that is regarded by the asylum nation as one of a "political character." Pursuant to these two provisions and 18 U.S.C. 3184, the magistrate heard evidence on the questions whether there was probable cause to believe that petitioner had committed the charged offenses and whether those offenses were regarded by the United States as political.

a. To demonstrate probable cause, the United States introduced on behalf of Israel the sworn statements of three witnesses—petitioner's alleged co-conspirator Jamal Yasin, Yasin's cousin Mufida Jaber, and an Israeli police captain (G. Ex. 1 at 12, 19-20, 25-26). Their statements showed that Yasin recruited petitioner to join the Al Fatah branch of the Palestine Liberation Organization (PLO). On May 11, 1979, the two men travelled to Tiberias, a resort town in Israel, for the purpose of "reconnaissance." After walking about the market place and main streets of Tiberias, they returned to Yasin's home in Al Bireh, on the West Bank (G. Ex. 1 at 12; Pet. App. 68a-70a).

Three days later, on May 14, Yasin prepared an explosive charge, which petitioner agreed to plant in a refuse bin in Tiberias. Yasin instructed petitioner to avoid military vehicles on his mission. Petitioner departed alone from Yasin's home at 9:00 that morning and returned at 4:30 that afternoon. He reported to Yasin that he had placed the charge in the center of town and had set the timer for approximately 1:30 p.m. (G. Ex. 1 at 12-13; Pet. App. 70a-72a).

On May 14, 1979, at 2:50 p.m., a bomb exploded in a refuse bin near a bus stop in a congested market area of Tiberias. The explosion killed two young boys and injured more than 36 other civilians. That evening both Yasin and petitioner heard radio reports that their mission had succeeded (G. Ex. 1 at 25-29; Pet. App. 72a-73a).

Thereafter, upon learning of the arrest of a friend, Yasin warned petitioner that they were in danger. Two days later, Yasin sent petitioner a letter through Yasin's cousin, Mufida Jaber, stating that others had been caught and that petitioner should be careful. Petitioner told Ms. Jaber that he planned to go to the United States by way of Amman, Jordan (G. Ex. 1 at 13, 19; Pet. App. 73a, 76a-79a).

On May 20, 1979, only six days after the Tiberias bombing, petitioner obtained a visa for entry into the United States. He departed from Israel for Jordan on June 5, 1979, and arrived in Chicago on June 14, where he stayed with his sister and her husband. Two months later, pursuant to a request from Israel, FBI agents came to his sister's home to execute an arrest warrant charging petitioner with murder and causing bodily harm. Petitioner gave a false name but accompanied the agents to FBI headquarters for fingerprints and photographs. Petitioner was arrested a few days later, after the agents had matched his prints with prints sent from Israel. When the agents mistakenly told petitioner that he was wanted in Jordan, petitioner corrected them, saying "It's the Israeli's [*sic*], not the Jordanians that want me" (Pet. App. 6-7; Tr. 15-25, 1398-1405).

At the hearing, petitioner sought to introduce affidavits of Yasin and Jaber recanting their confessions to the Israeli police. He also proffered 11 affidavits of friends, family, and a physician to establish an alibi for his whereabouts on the day of the bombing. None of these affidavits was admitted into evidence (Pet. App. 9-10, 51a-54a).

b. With respect to the question whether the offenses charged were regarded by the United States as of a "political character," Assistant Legal Adviser Louis Fields, Jr., an authorized spokesman for the Department of State, testified (Tr. 1041):

> It is the view of the Department of State that indiscriminate use of violence against civilian populations, innocent parties is a prohibited act and as such, is a common crime of murder. And it is punishable in both states.

His opinion was echoed in the statements of Assistant Legal Adviser Knute Malmborg and past and present high ranking government officials (see, *e.g.*, G. Exs. 10, 15, 17-19). Professor William Mallison Jr., testifying on behalf of petitioner, agreed with the other witnesses that bombing innocent civilians is an act of terrorism (Tr. 904) and that such a crime should not fall within the political offense exemption (Tr. 867).

2. The magistrate found probable cause to believe that petitioner was responsible for the death and injury of the victims of the Tiberias bombing (Pet. App. 45a-46a). She also found that the crimes charged did not fit within the political offense exception (Pet. App. 65a-66a):

> Accepting that [petitioner] was a member of a P.L.O. organization and with motivation toward its political objective, there is nothing in the evidence which "tends" to show that this act was directed in opposition to the State of Israel and that the crime

> furthered the cause of his group objective. He has not shown the relation between these crimes, the method of their commission and the political objective. The random and indiscriminate placing of an explosive near a bus stop on a public street in any trash bin defuses any theory that the target was a military one or justified by any military necessity. It was an isolated act of violence. The commission of these alleged offenses is so remote from the political objective that it could not reasonably have been believed by the offender to have a direct political effect on the government of Israel; nor was it directed at the government of Israel.

She thus certified petitioner as subject to extradition.[1] For the reasons stated in the magistrate's opinion, the district court denied the petition for a writ of habeas corpus (Pet. App. 35a-38a).

The court of appeals affirmed (Pet. App. 1-34). It upheld the magistrate's probable cause determination as based on sufficient evidence (*id.* at 5-11). It noted that the statements of Yasin, the confessed accomplice, were against his penal interest and were corroborated by other evidence, including petitioner's own acts (*id.* at 7-9). It further held that the recantations of Yasin and Jaber and petitioner's alibi affidavits were properly excluded because they come within the category of evidence contradicting or challenging the credibility of the prosecution case—evidence which is properly considered in a full-scale trial at which guilt or innocence is determined, not in a hearing to determine only the existence of probable cause (*id.* at 9-11).

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[1]The Department of State may still refuse to extradite petitioner if it believes that Israel seeks his return "with a view to trying or punishing him for an offense of a political character," that is, an offense other than murder and causing bodily harm. United States-Israel Convention on Extradition, Dec. 5, 1963, Art. VI, para. 4, 14 U.S.T. 1707, 1710, T.I.A.S. No. 5476.

The court concluded that it had jurisdiction to decide the question whether the crime charged against petitioner is a political offense and thus not a basis for extraditing petitioner under the treaty (Pet. App. 12-23). Accepting, for the purposes of its decision, that a conflict existed between the PLO and Israel, the court nonetheless rejected petitioner's "political offense" argument, holding that "indiscriminate bombing of a civilian populace is not recognized as a protected political act" even when the person who carries out the bombing is committed to a larger political objective (*id.* at 27-28).

ARGUMENT

1. Petitioner contends (Pet. 8-13) that Yasin's confession was inherently unreliable and should not have been credited by the magistrate. Accordingly, he contends, the magistrate's finding of probable cause was not supported by sufficient evidence.[2] He also argues (Pet. 21-23) that the district court should have admitted Yasin's and Jaber's recantations and the alibi affidavits at the extradition hearing. These claims are without merit.

The magistrate's probable cause determination in an extradition hearing must be sustained if "there [is] any evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925); *Escobedo* v. *United States*, 623 F. 2d 1098, 1101 (5th Cir.), cert. denied, No. 80-751 (Dec. 8, 1980). In the instant case, the evidence was ample. Petitioner does not deny that the bombing occurred.

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[2]Petitioner does not deny that probable cause is the appropriate standard of proof for an extradition hearing. See *Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925); *Collins* v. *Loisel*, 259 U.S. 309, 314-315 (1922); *In re Assarsson*, 635 F. 2d 1237, 1246 (7th Cir. 1980), cert. denied, No. 80-1423 Apr. 27, 1981); *Shapiro* v. *Ferrandina*, 478 F. 2d 894, 905 (2d Cir.), cert. dismissed, 414 U.S. 884 (1973).

Yasin's statement named petitioner as the person who placed the explosive charge in the Tiberias refuse bin. His statement was corroborated by Mufida Jaber, who delivered messages to petitioner after the incident warning him to be careful. It was also corroborated by petitioner's flight to America, his evasive conduct upon execution of the arrest warrant, and his admission to the FBI agents that Israel rather than Jordan was seeking his extradition.

Petitioner nevertheless suggests that Yasin's and Jaber's statements must be discredited because they were written in Hebrew, and therefore Yasin and Jaber, both Arabs, could not have understood what they were signing. But, as the court of appeals observed, the statements were sworn to be true and correct before an Arabic speaking judge in Jerusalem (G. Ex. 1 at 34). "The judge conversed with Yasin and Jaber in their native Arabic and determined that the witnesses understood their statements and that the statements were made of their own free will" (Pet. App. 10).[3]

Neither were the recantations of Yasin and Jaber, which were given to petitioner's attorneys, a reason for finding that their statements to the Israeli authorities did not adequately support the probable cause finding.[4] The magistrate

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[3]Petitioner's statement (Pet. 9) that Yasin's confession was taken under "inherently coercive circumstances" is speculative and not supported by the record. As stated above, an Israeli judge questioned Yasin and determined that the confession was freely given. Moreover, in Yasin's recantation, he explains that he implicated petitioner "because I was sure that he was outside the country, and that it was impossible to arrest him or cause him any harm due to my earlier statements against him" (Pet. App. 82a-83a). Yasin does not allege that he inculpated petitioner in response to torture or other coercion. There is no reason to believe that letters rogatory would provide an explanation other than the one Yasin gave to petitioner's attorneys in his affidavit.

[4]We note that in Yasin's recantation appended to the petition, Yasin does not deny having implicated petitioner in his original sworn statement. Rather he admits that he did so but states that he was lying at the time (Pet. App. 82a-83a).

was not required to consider the recantations. The question which of these witnesses' conflicting statements is true is to be resolved at trial in Israel. *Collins* v. *Loisel*, 259 U.S. 309, 316-317 (1922). The only question for the magistrate was "whether the evidence for the State [of Israel made] a *prima facie* case of guilt sufficient to make it proper to hold [petitioner] for trial." *Charlton* v. *Kelly*, 229 U.S. 447, 461 (1913). Yasin's statement, together with the other corroborating evidence, was sufficient to meet this probable cause standard. Cf. *United States* v. *Calandra*, 414 U.S. 338, 343 (1974).

The affidavits establishing an alibi for petitioner were also properly excluded by the magistrate. See *Charlton* v. *Kelly, supra*, 229 U.S. at 461; *Shapiro* v. *Ferrandina*, 478 F. 2d 894, 904-905 (2d Cir.), cert. dismissed, 414 U.S. 884 (1973). As petitioner candidly concedes (Pet. 22), "[o]rdinarily alibi evidence should not be admitted in a probable cause hearing." To hold otherwise would require Israel to engage in a trial on the merits in the United States. Israel would not be able to obtain extradition until it " 'had procured a conviction of [petitioner] upon a full and substantial trial here.' " *Collins* v. *Loisel, supra*, 259 U.S. at 316, quoting *In re Wadge*, 15 F. 864, 866 (S.D.N.Y. 1883). Accord, *Shapiro* v. *Ferrandina, supra*, 478 F. 2d at 902, 904-905. The magistrate was correct in limiting the scope of the hearing to determine whether Israel had established a prima facie case.

2. Contrary to the conclusion of the court of appeals (Pet. App. 12-23), we believe that the Secretary of State has sole discretion to decide whether the offense charged against an individual whose extradition is sought is a political offense within the terms of the applicable treaty.[5] We

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[5]The court of appeals acknowledged, however (Pet. App. 13; citations omitted), that it is solely for the determination of the Secretary of State whether, even assuming the offense charged is nonpolitical, "a

agree, however, that assuming the question is judicially reviewable, the courts below correctly concluded that the PLO bombing of civilians in Tiberias was not "an offense of a political character" exempting petitioner from extradition under the terms of Article VI, para. 4 of the convention between the United States and Israel.

Historically, political offenses were the principal crimes for which extradition was sought; but in the nineteenth century a growing sympathy for revolutionaries who sought to overthrow tyrannical governments led to the development of the political offense exception found today in many extradition treaties. See generally M. Bassiouni, "The Political Offense Exception in Extradition Law and Practice," *reprinted in International Terrorism and Political Crimes* 398-405 (M. Bassiouni ed. 1975); Lubet & Czackes, *The Role of the American Judiciary in the Extradition of Political Terrorists*, 71 J. Crim. L. & Criminology 193, 194-195 (1980); Epps, *The Validity of the Political Offender Exception in Extradition Treaties in Anglo-American Jurisprudence*, 20 Harv. Int'l L.J. 61-74 (1979); Note, *Terrorist Extradition and the Political Offense Exception: An Administrative Solution*, 21 Va. J. of Int. L. 163, 166-170 (1980). A two-fold exception was instituted under the belief that asylum should be granted (a) to persons charged with purely political crimes, such as treason, sedition, and espionage and (b) to persons charged with common crimes committed during the course of and in furtherance of "a political revolt, an insurrection or a civil war." *Ornelas* v. *Ruiz*, 161 U.S. 502, 511 (1896). See also M. Bassiouni, "The Political Offense Exception in Extradition Law and Practice," *supra*, at 405-412; Note, *supra*, 21 Va. J. Int'l L. at 164.

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country's requisition for extradition is made with a view to try or punish the fugitive for a political crime, i.e., whether the request is a subterfuge."

We question whether even bombings by PLO members aimed at government or military personnel would qualify for the political offense exception. Whatever the resolution of that question, however, the acts charged here clearly do not qualify. The commentators and the courts generally agree that the political offense exception should not be extended to terrorists who commit random acts of violence aimed at innocent civilian populations.[6] The mere fact that a terrorist is motivated by a desire to seek publicity for a political cause does not transform his common crime into a political offense. At the very least, the act must be "committed in the course of *and incidental to* a violent political disturbance." *Escobedo* v. *United States, supra*, 623 F. 2d at 1104 (emphasis added). As one commentator has stated (Lubet & Czackes, *supra*, 71 J. Crim. L. & Criminology at 194-195):

> Certain acts of violence, * * * existing at the fringe of legitimate revolution, challenge the conscionability of protecting such activities from extradition and punishment. It is the objective of the political offense exception to protect those violent acts which are necessary and corollary to political activity, not to sanction gratuitous assaults on human life.

Contrary to implications of petitioner's argument with respect to certain rejected evidence (Pet. 5-7, 21-22), both courts below accepted his assertions that he was a member of the PLO and that a conflict existed between the PLO and

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[6]There is no conflict among the circuits on this issue. The opinion on which petitioner relies (Pet. 15), *Karadzole* v. *Artukovic*, 247 F. 2d 198 (9th Cir. 1957), was vacated by this Court. 355 U.S. 393 (1958). On remand, the district court determined that Artukovic was not subject to extradition because a prima facie case of his guilt had not been established. *United States* v. *Artukovic*, 170 F. Supp. 383 (S.D. Cal. 1959). In dictum, the court stated (*id.* at 392-393) that the crimes charged (the extermination of more than 200,000 civilians during the Nazi occupation of Yugoslavia in World War II) were political offenses and exempt from extradition.

Israel.[7] Both courts, however, correctly found that petitioner had failed to show a sufficient connection between the conflict and the isolated, ruthless murder of two young boys (Pet. App. 27, 59a-65a). The bombing was not incidental to a rebellion against the Israeli government; it was a malicious act directed at civilians that could not reasonably have been expected to further the cause of the PLO. Accordingly, the magistrate's determination that petitioner is subject to extradition is both substantively correct and without procedural infirmity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1981

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[7]Petitioner contends (Pet. 22) that he should have been permitted to introduce additional evidence describing "the state of war between Israel and the PLO, the purposes and acts of the PLO, the people involved in armed resistance, the types of violence experienced, the nature and frequency of bombings in Israel, the uses of torture and denials of fair trials." But none of this evidence could validate an act of terrorism directed at civilians. No matter how favorable to the accused the proffered evidence might have been (*e.g.*, that many members of the PLO commit such acts in Israel), he or any other individual charged with the random and deliberate killing of innocent civilians would still properly be found subject to extradition.